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Supreme Court of the United States

October Term 1995

BRENDHAN B. HARRIS,

Petitioner,

v.

THE CITY OF VIRGINIA BEACH, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

Abram William VanderMeer, Jr.*
Timothy W. Dorsey
CLARK & STANT, P.C.
900 One Columbus Center
Virginia Beach, Virginia 23462
(804) 499-8800

** Counsel of Record*

THE LEX GROUP ♦ 1205 East Main Street ♦ Suite 2 East ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3256

QUESTIONS PRESENTED

Based on this Court's ruling in Connick v. Myers, the threshold inquiry in determining whether a discharged public employee has stated a cause of action under 42 U.S.C. § 1983 (1994) for a violation of his free speech rights is whether the employee's speech touched "on a matter of public concern." The questions presented are:

No. 1 Whether a police officer's sworn testimony, upon which a magistrate found probable cause to believe that a police lieutenant had committed misdemeanor criminal offenses, is inherently speech "on a matter of public concern."

No. 2 Whether a police officer's sworn testimony, upon which a magistrate found probable cause to believe that a police lieutenant had committed misdemeanor criminal offenses, is constitutionally protected as a matter of genuine public concern regardless of the police officer's personal motivation.

No. 3 Whether the *de novo* determination by the court of appeals that Petitioner's sworn testimony to a magistrate was motivated by purely private concerns should be reversed because it ignores uncontroverted evidence relied on by the district court.

LIST OF PARTIES

BRENDHAN B. HARRIS

v.

THE CITY OF VIRGINIA BEACH

and

GARY. M. VANAUKEN, III, Lieutenant;
MILTON E. BEANE, Captain;
W.W. BAKER, Captain;
DOUGLAS G. MCCLOUD, Major;
CHARLES R. WALL, Chief,

Individually and in their official capacities as officers of the Department of Police, City of Virginia Beach, Virginia;

and

FAGAN D. STACKHOUSE,

Individually and in his official capacity as Director of the Department of Human Resources, City of Virginia Beach, Virginia;

and

JAMES K. SPORE,

Individually and in his official capacity as City Manager of the City of Virginia Beach, Virginia

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In The

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BRENDHAN B. HARRIS,

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THE CITY OF VIRGINIA BEACH, et al.,

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

Brendhan B. Harris respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is unpublished and is reproduced in the Appendix to this brief ("App.") on page A1. The opinion of the district court, (App. at A23), is also unpublished.

JURISDICTION

The court of appeals entered its judgment on October 30, 1995. The court of appeals denied Harris's timely Petition for Rehearing with Suggestion for Rehearing In Banc, (App. at A38), on November 27, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1993).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment to the United States Constitution reads in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech. . . .

2. The Fourteenth Amendment of the United States Constitution reads in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. 42 U.S.C. § 1983 (1994) reads in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

I. Facts.

Harris brought a claim in the district court under 42 U.S.C. § 1983 (1994) and a pendant state claim for wrongful termination against the City of Virginia Beach, Virginia (the "City") and several of its officials.[1] The gravamen of Harris's claim is that he was terminated from his position as a police officer, in violation of his free speech rights, because he testified before a magistrate alleging criminal activity by one of his supervisors, Lieutenant Gary M. VanAuken.

Harris was a five year veteran of the police department of the City of Virginia Beach whose job performance was

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[1] Federal subject matter jurisdiction was invoked in the district court under 28 U.S.C. § 1331 (1993) and 28 U.S.C. § 1343 (1993) and supplemental jurisdiction was invoked under 28 U.S.C. § 1367 (1993). Jurisdiction in the court of appeals was invoked under 28 U.S.C. § 1291 (1993).

rated as well above average. (Tr. at 49-53, Exh. P/T-18-22.)[2] On August 28, 1992, Harris was dispatched to a local apartment complex to respond to Terry Grey's complaint of an unauthorized entry into her apartment. (Tr. at 58.) During Harris's investigation, the apartment complex manager produced a "work order" showing that the "intruder" was a maintenance man who had been directed to make repairs in Grey's apartment because of a complaint that Grey had previously made. (Tr. at 59.) Grey snatched the work order from the manager's hand and refused Harris's repeated requests that she return it. (Tr. at 60-61.) When Harris finally physically sought to retrieve the work order from Grey, her sister, Diedre Gamble, physically attacked Harris, hit him in the face and bit him. In the encounter, Harris subdued Gamble by spraying her with pepper gas. (Tr. at 61-62.)

Harris took Gamble into custody and, in accordance with police department policy, transported her to a nearby hospital for treatment of the pepper gas. (Tr. at 63.) After Gamble was treated, Harris transported her to police headquarters where he intended to take her before a magistrate to charge her with assault and battery and other offenses in connection with the incident. (Tr. at 63-64.) In several ensuing telephone conversations, VanAuken directed Harris to release Gamble from custody so that she could make a complaint against Harris to the Internal Affairs Division. (Id.; Tr. at 615-16.) Because he was aware of a standing general order that custody of a prisoner was the sole responsibility of the arresting officer, Harris questioned the legality of VanAuken's directive. (Tr. at 66; Exh. A-12.) Nonetheless, Harris released Gamble from custody. (Tr. at 67.)

After Gamble made her complaint to Internal Affairs, Harris gave his own statement to Internal Affairs then

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[2] References to the trial transcript and to trial exhibits will be abbreviated "Tr." and "Exh.", as appropriate.

proceeded to the magistrate's office and swore out warrants against Gamble and Grey. (Tr. at 69-70.) The warrants against Gamble were served. (Tr. at 71.) Before the warrants against Grey were served, Harris was directed to bring them to VanAuken. (Tr. at 71-72.) Harris delivered the Grey warrants to VanAuken, who placed them in his desk drawer without serving them. Id. Because he was aware of a Virginia statute that required that criminal warrants be served forthwith, Harris questioned VanAuken's conduct.[3]

The charges against Gamble were set for trial in the Virginia Beach General District Court on September 30, 1992. (Tr. at 72.) VanAuken advised the General District Court judge that the City desired to nolle prosequi the Gamble charges and handed the judge a letter, dated September 29, 1992, that VanAuken had prepared and initialed on behalf of Defendant Captain M. E. Beane. (Tr. at 74-75, Exh. P/T-8.) Harris obtained a copy of this letter and concluded that it contained a number of false and/or misleading statements. (Tr. at 76-79.)

In an attempt to remedy the criminal activity by VanAuken, Harris first addressed the situation within the police department. He filed an internal complaint on October 17, 1992 outlining the facts that VanAuken had ordered that Harris release a prisoner from custody, that he had withheld service of the warrants against Grey, and that he had provided false information to the Virginia Beach General District Court in connection with the Gamble charges. (Exh. P/T-1.) Harris's complaint was, however, reviewed solely by the

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[3] See Va. Code Ann. § 18.2-469 (Michie 1988) ("Officer refusing, delaying, etc., to execute process for criminal - If any officer willfully and corruptly refuse to execute any lawful process requiring him to apprehend or confine a person . . . charged with an offense, or willfully and corruptly omit or delay to execute such process, whereby such person shall escape and go at large, such officer shall be guilty of a Class 3 misdemeanor.").

police command and was dismissed as "unfounded." (Exh. P/T-7.)

After receiving a report of the police command's decision in his internal complaint, Harris requested that an outside panel of disinterested civilians (the Citizens Review Board) review his complaint. (Exh. P/T-5). This request was denied by the police command by memorandum dated March 9, 1993. (Exh. P/T-6.)

Harris believed that VanAuken had committed criminal misconduct in (1) directing Gamble's release from custody, (2) withholding service of the Grey warrants, and (3) submitting the false letter to the General District Court.[4] Moreover, Harris was aware that the statute of limitations on these offenses expired on August 28. Therefore, he appeared before a public magistrate shortly after midnight on July 30, 1992, and gave sworn testimony regarding VanAuken's misconduct. (Tr. at 95.) After hearing the testimony of Harris, the magistrate found probable cause to believe that VanAuken had committed three misdemeanors and issued three criminal summonses against him. (Tr. at 95-98, 451-54, Exh. A-9.)[5]

The issuance of the summonses set off shock waves in the police command. At approximately 10:00 a.m. that morning, Defendant Major D. G. McCloud telephoned Defendant City Manager James Spore's office and left the following message for Spore and his Chief of Staff:

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[4] See Va. Code Ann. § 18.2-460 (Michie 1988) (Obstruction of Justice: "If any person . . . attempts . . . to obstruct or impede the administration of justice in any court, he shall be guilty of a Class 1 misdemeanor."); see also Va. Code Ann. § 18.2-469 (Michie 1988) (refusing or delaying execution of criminal process), supra, note 3.

[5] While Harris appeared before the magistrate in uniform, the magistrate testified that he made an independent finding of probable cause and Harris's apparel had no effect on his determination. (Tr. at 453-54.)

> Major Doug McCloud called to let you and [Chief of Staff] Oral [Lambert] know that Officer B.B. Harris has obtained 3 summons [sic] from the Magistrate against Lt. VanAuken regarding this grievance. The summons [sic] include delaying the process to allow a person to escape, obstructing justice, etc. The City Attorney's Office has advised the officer is within his rights to obtain the summonses against his supervisor. They will be served on VanAuken today.
>
> There will be a press release later today and Major McCloud wanted you to know. (Chief Wall is on his way to Richmond). I have attached some backup information for you, but please ask Debby to return it later for my files.

(Tr. at 367-68, Exh. P/T-17.)

On August 6, 1993, Chief Wall convened a high level meeting to address the situation. (Tr. at 433-36.) Attending were the individual Defendants and others. Id. At the meeting a consensus was reached that Harris should be fired. Id. On August 19, 1993, Harris was officially terminated from his employment as a Virginia Beach police officer. (Exh. A-4.) The underlying action for which Harris was fired was his appearance before the magistrate causing the issuance of the criminal summonses. (Testimony of VanAuken, Tr. at 248; Captain Beane, Tr. at 360; Major McCloud, Tr. at 368, 370; Assistant City Attorney Randall Blow, Tr. at 427; Chief Wall, Tr. at 433, 438; Human Resources Director Stackhouse, Tr. at 492; Captain W.W. Baker, Tr. at 600-01.)[6]

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[6] The police department listed two grounds for Harris's termination: "Abuse of Position" and "Disobedience of Order." (Exh. A-4.) After

II. The Case Below.

Before trial, the Defendants filed a motion for summary judgment claiming that Harris's testimony did not raise an issue of public concern but was, instead, solely related to and motivated by a personal employment grievance. The district court had before it numerous exhibits and the record of proceedings before the City Personnel Board considering Harris's grievance protesting his firing.

During the Personnel Board proceedings, Harris testified that he approached the magistrate regarding VanAuken's criminal conduct, despite knowing it could affect his continued employment as a police officer, because of his concerns about corruption in the police department:

> This [criminal conduct of VanAuken] is not an isolated incident. . . . Finally, a man has to take a step and just say where does the integrity lie in this police department? And am I supposed to roll over and be just as corrupt as the rest of them by keeping my mouth shut and let them go on doing their illegal things, or am I going to make a stand . . . for every other cop that's out here working for Virginia Beach that have to go through with what I go through. That's why when there was only a month left, only 29 days left, I said I'm going to secure the warrants against Lieutenant VanAuken. I know they're going to frown at me, they're going to

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hearing all the evidence, both the jury and the district court found as a fact that these stated reasons for Harris's termination were a pretext for Harris's wrongful termination. (Transcript of Proceedings of July 28, 1994 at 3-4.) The district court also found that there was no credible evidence in the record that Harris's testimony contained false statements knowingly or recklessly made. (Id., Tr. at 471.)

> yell at, and they may even try to fire me, but it's the right thing to do. It's just a matter of integrity.

(Pers. Bd. Tr. at 30-31.)[7]

Later in the same proceedings, Harris emphasized his position saying:

> I would never put my head on the chopping block. I have a house. I have a car payment. I have all this stuff. I'm putting my head on the chopping block just because I have integrity and am willing to go forth and do whatever it takes to bring this into the open and say this is what your department is made of. This is exactly what it's made of. It's corrupt. They'll lie to you. You better know it. That's the way this police department is.

(Pers. Bd. Tr. at 41.)

Harris also testified about his attempts to address these issues within the police department before proceeding to the magistrate:

> I made complaints. They whitewash them. What is a policeman supposed to do? Do I go to the FBI? . . . [T]he way the system works, Lieutenant VanAuken can go out here and do anything he wants. When a complaint is made against him, it goes back to [Captain] Ernie

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[7] Refernces to transcript of City of Virginia Beach Personal Board Hearing of September 2, 1993 will be abbreviated as "Pers. Bd. Tr."

> Rorrer who stamps it "unfounded" and then Lieutenant VanAuken has gotten away with whatever he wants to get away with.

(Pers. Bd. Tr. at 36.)

After reviewing all the evidence, the district court denied the Defendants' motion for summary judgment and held that Harris's testimony clearly involved a matter of public concern:

> [T]he plaintiff's allegations that a police Lieutenant lied to a judge in order to effectuate a nol pros of charges, and wrongly refused to serve warrants clearly relates to "wrongdoing or a breach of trust" and is of obvious public concern. The very fact that the magistrate issued the warrants upon a finding of probable cause to believe VanAuken's actions were criminal supports plaintiff's position, since the Court believes that an allegation of potentially *criminal* activity on the part of a police officer in the administration of justice is of the highest public concern.

(App. at A30) (emphasis in original.)

VanAuken admitted at trial in the district court that he ordered Harris to release his prisoner, (Tr. at 268), that the letter he proffered to the General District Court contained a number of "incorrect" and "inaccurate" statements, (Tr. at 242, 281-82), and that he did not serve the warrant issued against Gray and may have placed it in his desk drawer, (Tr. at 307). At the conclusion of the trial, the jury returned its verdict in favor of Harris on both the 42 U.S.C. § 1983 (1994) claim and the pendant state claim, finding that

Harris's testimony before the magistrate was the motivating factor in his discharge. The district court then reviewed all the evidence and held that, as a matter of law, Harris's free speech interests outweighed the City's interest in the effective and efficient fulfillment of its responsibilities to the public.[8] The jury awarded damages on both counts and the district court entered final judgment against the City on the 42 U.S.C. § 1983 (1994) claim and against both the City and the individual Defendants on the state claim for wrongful termination.

After several post-trial motions relating primarily to damages, the City appealed to the United States Court of Appeals for the Fourth Circuit. The court of appeals reversed the district court's judgment in favor of Harris on the 42 U.S.C. § 1983 (1994) claim holding that, as a matter of law, Harris's testimony exposing criminal conduct within the ranks of the police department was not "speech on a matter of public concern."

The court of appeals found that "[t]here is insufficient evidence in the record, as a matter of law, to show that in swearing out the complaint Harris was acting as a public citizen concerned with police corruption, as opposed to acting as a police officer embroiled in a personnel dispute." (App. at A10.)[9] Specifically, the court of appeals found that, despite the content of Harris's testimony, the personal context of the testimony (i.e. the fact that Harris may have been motivated in

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[8] The district court granted the individual Defendants qualified immunity on the 42 U.S.C. § 1983 (1994) claim before charging the jury.

[9] The court of appeals remanded the case to the district court to determine whether, in light of its reversal on the constitutional claim, Harris stated a cause of action for wrongful termination in the state claim. The court of appeals majority did not address Harris's cross-appeal concerning damages on the state claim or the granting of qualified immunity to the individual Defendants on the constitutional claim.

part by his perception that VanAuken had mistreated him in the handling of the Grey situation) removed it from constitutional protection. (App. at A12.)

REASONS FOR GRANTING THE PETITION

As the dissenting opinion of Judge Heaney points out, (App. at A16-A21), the decision of the court of appeals conflicts with decisions of other circuits. Accordingly, this case raises critical issues on whether public employees, who have direct knowledge of wrongdoing by public officials because they are in a position to detect it, constitutionally may be fired for reporting such wrongdoing.

This Court has clearly established that a State may not discharge an employee because of that employee's exercise of constitutionally protected freedom of speech. Perry v. Sindermann, 408 U.S. 593, 597 (1972). "[T]he threat of dismissal from public employment is . . . a potent means of inhibiting speech. Rankin v. McPherson, 483 U.S. 378, 384, reh'g denied, 483 U.S. 1056 (1987) (citing Pickering v. Board of Educ., 391 U.S. 563, 574 (1968)). A public employee's speech, however, is not absolute.

> The determination whether a public employer has properly discharged an employee for engaging in speech requires a "balance between the interests of the [employee], as a citizen, in commenting on matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."

Rankin, 483 U.S. at 384 (quoting Pickering, 391 U.S. at 568).

In Connick v. Myers, 461 U.S. 138 (1983), this Court synthesized its previous rulings and enunciated a three-prong

test to determine whether a discharged public employee has alleged a valid cause of action under 42 U.S.C. § 1983 (1994) for an infringement of his constitutionally protected free speech rights. As a threshold inquiry, a trial court must determine, on the basis of "the content, form, and context of a given statement, as revealed by the whole record," whether the employee was speaking "as a citizen upon matters of public concern," or, alternatively, "as an employee upon matters only of personal interest." Id. at 147-48. This threshold inquiry is one of law for the trial court. Connick, 461 U.S. at 148 n.7.[10]

I. A police officer's sworn testimony before a magistrate concerning criminal misconduct by his supervisor is inherently speech "on a matter of public concern."

Harris's testimony satisfies Connick's threshold inquiry based on principles set forth by this Court. The decision by the court of appeals, therefore, conflicts with this Court's precedent.

An employee's speech addresses a matter of public concern when it can "be fairly considered as relating to any matter of political, social or other concerns of the

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[10] If the employee did speak out on a matter of public concern, a trial court must balance the strength of the employee's First Amendment interest against the strength of the countervailing governmental interest in promoting efficient performance of the public service the government agency or entity must provide through its employees. Pickering, 391 U.S. at 568. If the trial court determines, under the first two prongs, that the public employee's speech was constitutionally protected, the plaintiff-employee must show, as a matter of fact, that the protected expression was a substantial or motivating factor in the adverse employment decision. Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977).

community." Connick, 461 U.S. at 146.[11] There can be no doubt that Harris's testimony exposing criminal misconduct by a police lieutenant that had been whitewashed on internal review by the police command involves matters of inherent public interest. "[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values and is entitled to special protection." Connick, 461 U.S. at 145 (quoting NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913, reh'g denied, 459 U.S. 898 (1982); Cary v. Brown, 447 U.S. 455, 467 (1980)) (internal quotation marks omitted). "[P]ublic awareness and criticism have even greater importance where, as here, they concern allegations of police corruption." Gentile v. State Bar of Nevada, 501 U.S. 1030, 1035 (1991) (citing Nebraska Press Assoc. v. Stuart, 427 U.S. 539, 606 (1976) (Brennan, J. concurring in judgment) ("commentary on the fact that there is strong evidence implicating a government official in criminal activity goes to the very core of matters of public concern.")).[12]

The courts of appeals have almost uniformly held that exposing corruption by public servants is a matter of inherent

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[11] It is obvious from the message left for Virginia Beach's City Manager by Defendant Major McCloud, immediately after Major McCloud learned that the summonses against VanAuken had been issued, that the City itself considered the matter of significant public concern. See pp. 6-7, supra.

[12] While the Fourth Circuit majority agreed that speech alleging corruption, dishonesty and illegality within the ranks of law enforcement involve matters of public concern, (App. at A11 n.7), it found "a virtual absence of evidence in the record indicating that Harris was 'exposing' any corruption whatsoever . . ." Id. As discussed below, this finding was based on both an erroneous legal conclusion about the import of motivation in the Connick analysis and an erroneous *de novo* conclusion concerning Harris's motivation.

public concern.[13] Several circuits have expressly held that, where speech exposes corruption within the ranks of law enforcement, it is inherently on a matter of public concern.[14]

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[13] See, e.g., Orange v. District of Columbia, 59 F.3d 1267, 1272-73 (D.C. Cir. 1995) (examining potential fraud at a public university involves matters of interest to the community, seeking as it does to "bring to light actual or potential wrongdoing or breach of public trust."); Feldman v. Philadelphia Hous. Auth., 43 F.3d 823, 829 (3d Cir. 1994) (auditor disclosing corruption, fraud, and illegality via audit reports in government agency is a matter of significant public concern); Davis v. Ector County, 40 F.3d 777, 782 (5th Cir. 1994) (allegations of sexual harassment of public employees and possible coverup involves the misbehavior of public officials and is a matter of public interest); Frank v. Relin, 1 F.3d 1317, 1329 (2d Cir.), (employee's speech relating to possible Brady violations by assistant district attorneys centered on matter of great public concern), cert. denied, 114 S. Ct. 604 (1993); O'Connor v. Steeves, 994 F.2d 905, 915 (1st Cir.) ("[Plaintiff's] revelations directly implicated a topic of inherent concern to the community - official misconduct by an incumbent elected official."), cert. denied, 114 S. Ct. 634 (1993); Patrick v. Miller, 953 F.2d 1240, 1247-48 (10th Cir. 1992) (perceived illegalities in City's budgeting activities constituted topic of "inherent" public concern: "'[s]peech which discloses any evidence of corruption, impropriety or other malfeasance on the part of city officials, in terms of content, clearly concerns matter of public import'") (quoting Conaway v. Smith, 853 F.2d 789, 796 (10th Cir. 1988)); Marohnic v. Walker, 800 F.2d 613, 616 (6th Cir. 1986) (public interest is near its zenith when ensuring that public organizations are being operated in accordance with the law).

[14] See, e.g., Walter v. Morton, 33 F.3d 1240, 1242-43 (10th Cir. 1994) (statements of perceived illegal activities of chief of police are matter of concern for the community); Thompson v. City of Starkville, 901 F.2d 456, 463 (5th Cir. 1990) (where speech "complained of misconduct within the police department, it should be classified as speech addressing a matter of public concern."); Dobosz v. Walsh, 892 F.2d 1135, 1141-42 (2d Cir. 1989) (allegations that police officer planted gun on person shot by officer is clearly matter of public concern); Bryson v. Waycross, 888 F.2d 1562, 1566 (11th Cir. 1989) ("a core concern of the first amendment is the protection of the 'whistle-blower' attempting to expose government corruption," in this case, police corruption), reh'g denied, 894 F.2d 414 (11th Cir. 1980); Soloman v. Royal Oak Twp, 842 F.2d 862, 865 (6th Cir. 1988) (allegation of obstruction of justice by second in command in police

Given that the decision of the court of appeals majority conflicts with this Court's previous rulings on the issue as well as those in the other circuits, this Court should grant the writ to exercise its supervisory power.

II. Speech the content or context of which is of inherent public concern does not lose its constitutional protection when the speaker is motivated by both personal and civic concerns.

A. The Split Among the Circuits.

The courts of appeals have adopted conflicting approaches for determining whether a topic of employee speech is of "public concern." Some have adopted a content-based approach, focusing exclusively on "'which information is needed or appropriate to enable the members of society' to make informed decisions about the operation of their government," McKinley v. City of Eloy, 705 F.2d 1110, 1113-14 (9th Cir. 1983) (quoting Thornhill v. Alabama, 310 U.S. 88, 102 (1940)). Under the "content-based" approach, the objective content of an employee's statement is determinative, and the "form and context" of the statement are examined only in close cases to determine whether the content of the statement is of "public concern." This approach down-plays motivation when the public employee speaks on certain topics of "inherent" public

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department is a matter of public interest); McMurphy v. City of Flushing, 802 F.2d 191, 196 (6th Cir. 1986) (public is obviously concerned with how a police department is operated, and efforts to give public exposure to alleged misconduct are protected); O'Brien v. Caledonia, 748 F.2d 403, 407 (7th Cir. 1984) (a police officer's perception of potential graft and corruption is deserving of vigilant protection by the First Amendment); Brockell v. Norton, 732 F.2d 664, 668 (8th Cir. 1984) (public has a vital interest in integrity of those commissioned to enforce the law).

interest, such as official malfeasance or abuse of office.[15] Petitioner believes that this is the appropriate analytical approach.[16]

Other courts have adopted a context-based approach that turns either entirely or in significant part on the employee's subjective intent or motivation, i.e., whether the employee's speech "was calculated to disclose misconduct" or to inspire public debate on some issue of significant public interest.[17] Under this context-based approach, a determination

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[15] See Johnson v. Multnomah County, 48 F.3d 420, 424-25 (9th Cir.) ("content is the greatest single factor in the Connick inquiry"), cert. denied, 115 S. Ct. 2616 (1995) (quoting Berg v. Hunter, 854 F.2d 238, 243 (7th Cir. 1988), cert. denied, 489 U.S. 1053 (1989)); Havekost v. United States Navy, 925 F.2d 316, 318 (9th Cir. 1991) ("motive should not be used as a litmus test for public concern"); Koch v. City of Hutchinson, 847 F.2d 1436, 1446 n.17 (10th Cir.) (en banc), cert. denied, 488 U.S. 909 (1988); Zamboni v. Stamler, 847 F.2d 73, 78 (3d Cir.) (motivation is not a controlling factor to be considered in assessing the protected character of the employee's speech), cert. denied, 488 U.S. 899 (1988); Brasslett v. Cota, 761 F.2d 827, 844 n.14 (1st Cir. 1985) (according no apparent consideration to public employee's personal motive, where fire chief's public commentary on available fire protection, and on Town Council's actions in dealing with associated problems were "prototypical matters of public concern").

[16] There are rare instances in which the context surrounding speech may concern matters of such inherent public concern that the speech will pass Connick's threshold inquiry despite having content that is purely private in nature. Though inexactly labelled, the analysis of such speech would fall the content-based approach. See discussion of Rankin, infra Section II(B).

[17] Callaway v. Hafeman, 832 F.2d 414, 417 (7th Cir. 1987) ("While the content of [plaintiff's] communications touched upon an issue of public concern generally . . . such speech stands unprotected from employer scrutiny when uttered in the pursuit of purely private interests."); Terrell v. University of Texas Sys. Police, 792 F.2d 1360, 1362 (5th Cir. 1986) ("The mere fact that the topic of the employee's speech was one in which the public might or would have had a great interest is of little moment."), cert. denied, 479 U.S. 1064 (1987); Linhart v. Glatfelter, 771 F.2d 1004,

that the content of the expression addresses a "matter of public concern," while often described as "the greatest single factor in the Connick inquiry," Breuer v. Hart, 909 F.2d 1035, 1039 (7th Cir. 1990) (quoting Belk v. Town of Minocqua, 858 F.2d 1258, 1264 (7th Cir. 1988)), does not end the inquiry. In certain circumstances the employee may still be disciplined if the "form and context" of the speech indicate that the speech addressed "matters of only personal interest." Connick 461 U.S. at 147. In reversing the judgment in favor of Harris, the court of appeals used this context-based approach.

These two approaches to Connick's threshold inquiry diametrically conflict. Because the varying approaches taken by the circuits produce conflicting results, this Court should grant the writ to resolve the conflict.

B. Mixed motivation of the speaker does not deny the speech constitutional protection.

In determining whether speech is constitutionally protected, this Court has stated that the focus is whether the employee was speaking "as a citizen upon matters of public concern," or, alternatively, "as an employee upon matters *only* of personal interest." Connick, 461 U.S. at 147 (emphasis added). If speech loses constitutional protection when it involves matters *only* of personal interest, then it follows that speech must be constitutionally protected if it involves either (1) matters only of public interest or (2) a mixture of matters that are of public interest and private interest.

When the employee speaks on matters of both public and private interest, the employee's motivation is correspondingly mixed (i.e. he is motivated by both civic and

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1010 (7th Cir. 1985) (Connick "requires us to look at the point of the speech in question: was it the employee's point to bring wrongdoing to light? Or to raise other issues of public concern, because they are of public concern? Or was the point to further some purely private interest?").

private impulses). It follows then that speech does not lose its constitutional protection merely because it is motivated in part by purely private interests. Therefore, so long as speech involves matters of inherent public interest in some part, the speech must pass Connick's threshold inquiry, notwithstanding some personal motivation on the part of the speaker.

This Court's analysis in Connick reveals that mixed motivation behind speech does not deprive it of its constitutional protection when the content of the speech involves a matter of inherent public concern. In Connick, an assistant district attorney, opposing her transfer to another department, circulated a questionnaire "concerning office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns." 461 U.S. at 141. Analyzing the questions contained in the questionnaire, this Court noted that twelve of the questions reflected mere employee dissatisfaction and "did not seek to inform the public that the District Attorney's office was not discharging its governmental responsibilities . . . [or] seek to bring to light actual or potential wrongdoing or breach of trust on the part of [public officials]." Id. at 148.

This Court then stated that the content of one of the thirteen questions did touch on an inherent "matter of interest to the community" (whether assistant district attorneys were pressured to work in political campaigns). After this determination, this Court did not analyze Meyers' motivation in making the speech but instead proceeded to evaluate that one question separately, under the second "balancing" step in the Pickering analysis. Id. at 149-54.

The separate treatment given the one item of "inherent public concern" on the employee questionnaire is consistent with exempting such clear or inherent First Amendment speech from the full-scale threshold inquiry into the employee's motivation in speaking. See Zamboni v. Stamler, 847 F.2d at 78 ("[w]ere motivation rather than content

dispositive [in Connick], the Court would have had no reason to isolate the one question that was of public concern"), cert. denied, 488 U.S. 899 (1988).

In Rankin v. McPherson, this Court took a similar approach with respect to the context of the employee's speech. Rankin concerned a law enforcement employee's private comment to a co-worker following the attempted assassination of President Reagan: "if they go for him again, I hope they get him." 483 U.S. at 381. This Court first determined that the context surrounding the speech "plainly dealt with a matter of public concern," insofar as it "came on the heels of a news bulletin regarding what is certainly a matter of heightened public attention: an attempt on the life of the President." Id. at 386. This Court then paid little attention to the content and form of the speech other than to verify that neither the content nor form of the speech pointed to matters of public concern. Id. at 386-87. More to the point, this Court completely disregarded any motive that McPherson may have had in speaking.

Had this Court analyzed the motivation behind McPherson's speech, it undoubtedly would have concluded that the statement (which apparently occurred without premeditation, in a private conversation between co-workers) was motivated by little or no civic concern to inform the public on any relevant issue. Based on the fact that the context of the speech involved an inherent matter of public concern, this Court held that McPherson's speech passed scrutiny under Connick's threshold inquiry, notwithstanding the lack of civic-minded motivation that McPherson may have had in making the speech.

Rankin makes clear that a speaker's mixed motivation is not determinative in Connick's threshold inquiry when the

speech involved concerns a matter of inherent public concern.[18]

In this case, while Harris clearly had a personal interest in exonerating his own handling of the Grey incident, the content of his testimony concerned police misconduct, the form of his speech was sworn testimony before a public magistrate, and the manifest purpose of his testimony was to bring the matter to the attention of the judiciary for resolution. Because the decision of the court of appeals improperly deemed Harris's personal motivation controlling in conflict with this Court's contrary precedent, the Petition should be granted.

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[18] See Thompson, 901 F.2d at 463 ("The existence of an element of personal interest on the part of an employee in his or her speech does not, however, dictate a finding that the employee's speech does not communicate on a matter of public concern."); Hall v. Ford, 856 F.2d 255, 260 (D.C. Cir. 1988) ("But neither does a topic otherwise of public concern lose its importance merely because it arises in an employee dispute."); Zamboni, 847 F.2d at 77-78 ("[I]t is unlikely that any employee who lacks a personal interest in the subject matter that gives rise to the speech in question would file a lawsuit to vindicate his or her First Amendment rights."); Rode v. Dellarciprete, 845 F.2d 1195, 1202 (3d Cir. 1988) ("Dismissing Rode's speech as unprotected merely because she had a personal stake in the controversy fetters public debate on an important issue because it muzzles an affected public employee from speaking out."); Gonzalez v. Benevides, 774 F.2d 1295, 1300-01 (5th Cir. 1985) ("We do not read Connick . . . to exclude the possibility that an issue of private concern to the employee may also be an issue of public concern. Indeed, the teacher dress code at issue in Mount Healthy and the school bonds under discussion in Pickering, appear to have been "mixed" issues of both public and private concern."), cert. denied, 475 U.S. 1140 (1986); But see Versarge v. Clinton, 984 F.2d 1359, 1365 (3d Cir. 1993) (that expelled member of volunteer fire department was motivated by "personal grudge" weighed against finding that he spoke on matter of public concern).

III. The *de novo* determination by the court of appeals that Harris's testimony was motivated solely by private concerns ignores unrebutted record evidence.

The court of appeals majority blithely concluded, "Harris swore out the warrant [sic] . . . for his own personal vindication, and any interest he may have had in exposing police corruption was only incidental to his own personal grievance." (App. at A14.) This conclusion has no support in the record.

The record reveals that Harris was very much aware that speaking out on VanAuken's criminal misconduct might result in his termination. Despite his own best interests, Harris testified before the magistrate so that he might bring an end to VanAuken's misconduct and bring integrity back into the ranks of the police department.

The true context surrounding Harris's testimony is that he was a "whistleblower" who was left with few options in reporting criminal activity. Harris first attempted to expose VanAuken's misconduct by invoking internal complaint procedures. The police command, without explanation or comment, simply held that Harris's complaint was "unfounded." When Harris then requested that the Citizens Review Board look into the matter, the police department refused his request. When there were only a few weeks before the statute of limitations expired, Harris was left with no recourse but to appear before the public magistrate in an effort to bring his concerns before the Virginia judiciary for final resolution.

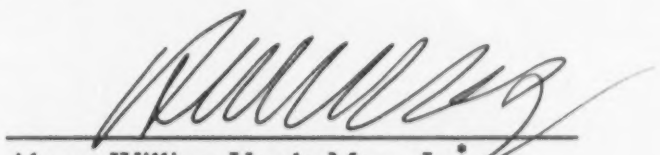
The uncontroverted evidence is that Harris knew that testifying before the magistrate would jeopardize his job. He was willing to risk his job because he believed that placing the issue before the judiciary would expose criminal corruption and restore integrity. Moreover, the court of appeals majority ignored the magistrate's uncontradicted testimony that he made

an independent finding on Harris's testimony that there was probable cause to believe that VanAuken had obstructed justice and committed other misdemeanors. Harris could not and did not unilaterally make the decision to prosecute VanAuken. Indeed, in this context, Harris's sworn testimony is far more worthy of constitutional protection than that of Deputy McPherson in Rankin or the internal questionnaire of Ms. Meyers in Connick.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Abram William VanderMeer, Jr.*
Timothy W. Dorsey
Clark & Stant, P.C.
900 One Columbus Center
Virginia Beach, VA 23462
(804) 499-8800
* *Counsel of Record*

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UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRENDHAN B. HARRIS,
Plaintiff-Appellee,

v.

THE CITY OF VIRGINIA BEACH,
Defendant-Appellant,

G. M. VAN AUKEM, III, Lieutenant; M. E. BEANE, Captain; W. W. BAKER; D. G. MCCLOUD, Major, CHARLES R. WALL, Individually and as Officer of the Department of Police, City of Virginia Beach, Virginia; FAGAN D. STACKHOUSE, Individually and as the Director of the Department of Human Resources, City of Virginia Beach, Virginia; JAMES K. SPORE, Individually and in his official capacity as city Manager of the City of Virginia Beach, Virginia,
Defendants.

NO. 94-2091

BRENDHAN B. HARRIS,
Plaintiff-Appellant,

v.

THE CITY OF VIRGINIA BEACH;
G. M. VAN AUKEN, III, Lieutenant; M. E. BEANE, Captain;
W. W. BAKER; D. G. MCCLOUD, Major,
CHARLES R. WALL, Individually and as Officer of the
Department of Police, City of Virginia Beach, Virginia;
FAGAN D. STACKHOUSE, Individually and as the Director
of the Department of Human Resources, City of
Virginia Beach, Virginia; JAMES K. SPORE, Individually
and in his official capacity as City Manager of the City of
Virginia Beach, Virginia,
Defendants-Appellees.

No. 94-2122

Appeals from the United States District Court
for the Eastern District of Virginia, at Norfolk.
Raymond A. Jackson, District Judge.
(CA-93-1 15 1-2)

Argued: May 2, 1995

Decided: October 30, 1995

Entered: October 30, 1995

Before LUTTIG and WILLIAMS, Circuit Judges, and
HEANEY, Senior Circuit Judge of the United States Court of
Appeals for the Eighth Circuit, sitting by designation.

Reversed and remanded by unpublished per curiam opinion.
Senior Judge Heaney wrote a dissenting opinion.

COUNSEL

ARGUED: L. Steven Emmert, CITY ATTORNEY'S OFFICE FOR THE CITY OF VIRGINIA BEACH, Virginia Beach, Virginia, for Appellant. Abram William VanderMeer, Jr., CLARK & STANT, P.C., Virginia Beach, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

The City of Virginia Beach (the City) appeals from a jury verdict in favor of Brendhan B. Harris regarding the City's decision to terminate his employment as a police officer. Harris sued the City, claiming that in terminating his employment the City violated his First Amendment rights, pursuant to 42 U.S.C. § 1983, and wrongfully terminated him under Virginia state law. The primary issue raised by the City on appeal turns on the district court's ruling that, as a matter of law, the First Amendment protected Harris's conduct in this case under *Pickering v. Board of Education*, 391 U.S. 563 (1968), and *Connick v. Myers*, 461 U.S. 138 (1983). Harris, on the other hand, cross-appeals from the district court's decisions (1) to grant qualified immunity to a number of the individual defendants,[1] (2) to deny his motion to amend his complaint to name additional defendants, and (3) to modify the jury's damage award by reducing the future damages award and setting aside the punitive damages award. For the reasons that follow, we conclude that the district court erred in ruling that Harris's speech, as a matter of law, was protected by the First

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[1] Charles R. Wall, Fagan D. Stackhouse. James K. Spore, Leslie L. Lilley, G.M. Van Auken, M.E. Beane, W.W. Baker, and D.G. McCloud.

Amendment. Accordingly, we reverse and remand for further proceedings on the state law claim.

I.

This case concerns the City of Virginia Beach's termination of Brendhan B. Harris, one of its police officers. On August 28, 1992, the police department dispatched Harris to the Lake Edward Apartments to respond to a tenant's complaint of an unauthorized entry into her apartment. When Harris arrived at the apartment complex, he spoke with the tenant, Terry Grey, and concluded that the intruder was likely a maintenance man for the apartment complex. Harris went to see the apartment complex's manager, Colette Goodfellow, to confirm his analysis. Goodfellow went to find the maintenance man and shortly thereafter returned with a work order directing the maintenance man to perform repairs in Terry Grey's apartment. However, Grey grabbed the work order from Goodfellow's hand and refused to let it go. Harris then attempted to retrieve the work order from Grey and return it to Goodfellow. When Harris grabbed Grey's wrist, Diedre Gamble -- Grey's sister who had arrived at the scene some moments before -- physically attacked Harris. After a brief struggle, Harris subdued Gamble by spraying her with pepper gas.

Once he had subdued Gamble with the pepper spray, Harris took Gamble into custody and transported her to a nearby hospital for treatment. En route, Harris reported the incident to his immediate supervisor, Lieutenant Gary Van Auken. Near this time, however, Anthony Ortiz, another police officer who had arrived at the apartment complex during the altercation, reported to Van Auken that Harris had acted improperly in his handling of the incident

After the hospital treated Gamble, Harris transported her to police headquarters with the intention of taking her before a magistrate to charge her with assault and battery in connection with the incident. Van Auken, however, directed Harris to call him from the magistrate's office. Over the course of several ensuing telephone calls, Van Auken instructed Harris to release Gamble from custody so that she could file a complaint against Harris with Sergeant Vandeheiden of the Internal Affairs Division. He also directed Harris to do nothing

further in this matter.[2] After securing legal advice, Harris gave his own statement to Vanderheiden of the events that had occurred. Harris then proceeded to the magistrate's office and swore out warrants against both Diedre Gamble and the tenant Terry Grey.[3] The warrant against Gamble was served; however, before the warrant against Grey could be served, Captain E.E. Rorrer directed Harris to relinquish it to Van Auken. When Harris delivered the Grey warrant to Van Auken, Van Auken placed it in his desk drawer.

On September 30, 1992, a trial on Harris's charges against Gamble was held before a Virginia Beach General District Court. When the court called the case, Van Auken handed the judge a letter dated September 29, 1992, that Van Auken had prepared and initialed on behalf of Captain M.E. Beane. The letter advised the court that the City desired to *nolle prosequi* the Gamble charges. The court responded by dismissing the case against Gamble without prejudice.

Subsequently, the Internal Affairs Division released the results of its investigation of Harris's actions. The Internal Affairs Division report criticized Harris's role in the events at the apartment complex. As a result of the report, the department took the following disciplinary action against Harris: a four-hour suspension for violation of Van Auken's order not to proceed further against Gamble and Grey and a four-hour suspension for the use of unnecessary force against Grey with the pepper spray.

As Harris continued to pursue the matter, the City responded with orders to discontinue his personal investigation during office hours. By a letter of September 30, 1992, Rorrer instructed Harris not "to pursue this matter further as a police officer," and not to take any action against Grey or Gamble while on duty. (J.A. 317). The letter specifically instructed Harris that if he were to proceed any

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[2] Van Auken also directed Vanderheiden to go to the magistrate's office to process Gamble's complaint. Harris claims that he was surprised by Van Auken's orders because general policy was that custody of a prisoner was the sole responsibility of the arresting officer. However, in response to Van Auken's order, Harris released Gamble from custody.

[3] The City maintains that this was done explicitly in contradiction to Van Auken's orders not to further pursue the matter pending the investigation by the Internal Affairs Division.

further with the matter, he "must wear plainclothes [sic] and clearly represent [him]self as a private citizen." (J.A 317). Finally, in case any of the above was ambiguous, Captain Rorrer made clear to Harris that "[i]f you have any doubts or concerns about what to do, you are to personally contact me and I will make it clear to you." (J.A. 318).

On October 17, 1992, Harris filed an internal complaint about the conduct of Van Auken and Rorrer regarding their actions (1) directing that Gamble be released from custody, (2) withholding service of the warrant against Grey, and (3) providing false information to the Virginia Beach court in connection with the Gamble charges. Late in 1992, while the investigation was pending, the City assigned Harris to a different precinct, under different supervisors, apparently to ease tensions. On January 19, 1993, after conducting an investigation, Chief Charles Wall issued a report advising Harris that his complaint against Van Auken and Rorrer was unfounded. Harris then requested that a citizen review board review Wall's decision, but this request was denied by a memorandum order of March 9, 1993.

On July 30, 1993, more than eleven months after the Lake Edwards Apartments incident and seven months after his transfer, Harris appeared before a magistrate to swear out a criminal complaint against Van Auken. Although this event took place after midnight, Harris was on duty and in his police uniform. According to Harris, his motive for swearing out the Complaint was his fear that the statute of limitations would run on August 28, 1993. Harris testified before the magistrate judge that Van Auken was guilty of criminal conduct in directing the release from custody of Gamble, withholding service of the Grey warrant, and submitting the allegedly false letter to the court to obtain a dismissal of the Gamble case. As a result of Harris's testimony, the magistrate judge found probable cause and issued criminal summonses against Van Auken for (1) obstructing justice, based on Van Auken's original order to Harris directing him to release Gamble to the Internal Affairs investigator and the *nolle prosequi* request on the Gamble case to the judge, and (2) corruptly withholding service of the Grey warrant.

The issuance of the summonses against Van Auken apparently set off shock waves in the command structure of the police department. On August 6, 1993, Police Chief Charles Wall called a meeting attended by Van Auken, and

Captains Rorrer, Beane, and Baker, in which the group reached a consensus to dismiss Harris. Captain Beane prepared a Personal Conduct Report stating the reasons for Harris's termination. On August 19, 1993, the City officially terminated Harris's employment as a police officer, ostensibly or the reasons given in the Personal Conduct Report.[4]

Harris appealed his dismissal to the City's Personnel Review Board (the "Board"). On September 2, 1993, the Board held a full hearing. On September 7, 1993, the Board affirmed the dismissal in a written order. At that time, Harris's dismissal became final. Harris maintains that his dismissal was in direct retaliation for his appearance before the magistrate judge to get the issuance of the warrants against Van Auken.[5]

Harris filed an initial complaint in federal court against the City, Van Auken, Beane, and other City officials, on November 23, 1993, and a first amended complaint on December 7, 1993.[6] In Count I of the amended complaint, Harris alleges, pursuant to 42 U.S.C. § 1983, that the defendants violated his First Amendment right to swear out the complaint against Van Auken. In Count II, Harris alleges retaliatory discharge under provisions of the Virginia state and local codes prohibiting dismissal because a state employee reports a violation of the law. Before trial, the district court ruled that under *Pickering* and *Connick:* (1) Harris's speech was of "public concern," and, accordingly, protected under the First Amendment as a matter of law; and (2) the issue of whether the City had fired Harris because he had engaged in protected conduct, rather than for illegitimate reasons, presented a genuine issue of material fact for the jury.

The case proceeded to trial on the merits before a jury, beginning on July 19, 1994. At the close of all the evidence, the district court ruled that the individual defendants were

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[4] The termination letter stated that Harris violated Rule 5 of the police department's rules and regulations for disobedience of order and Rule 3A for abuse of position.

[5] There is no serious debate that Harris performed his job in a competent manner during the approximately four and one-half years before the events in question.

[6] These other officials include: James Spore, the City Manager; Fagan Stackhouse, the Director of Human Resources; Police Chief Wall; Major McCloud; Captain Baker; and, Leslie L. Lilley, City Attorney.

entitled to qualified immunity. Accordingly, it dismissed Harris's constitutional claims against them in their individual capacities, but still allowed Harris to proceed against them individually under Count II, the state law claim. The jury found the City liable to Harris for the following: (1) $41,712 in compensatory damages on his § 1983 claim; and, (2) $125,000 in compensatory damages on his wrongful termination claim for "loss of professional opportunity" and $200,000 in punitive damages. The jury held each of the individual defendants liable for $100 in punitive damages.

With the jury verdict rendered, the district court proceeded to issue a series of orders on a variety of issues surrounding liability and damages. On July 28, 1994, the district court entered its own findings of fact and conclusions of law on the equitable relief Harris sought. First, the district court held firm to its earlier rulings under *Connick* that, as a matter of law, Harris's speech was protected under the First Amendment. Second, the district court explicitly ruled that, as a matter of law, under *Connick* the value of Harris's speech outweighed the City's interests in efficiently operating the police department. Third, the district court ordered the City to reinstate Harris to his position, to compensate him with back pay of $43,000, and otherwise to make him whole. Finally, the district court struck the jury's award of punitive damages against the individual defendants. On August 11, 1994, the City moved the court for post-judgment relief. On November 4, 1994, the district court granted the City's motion in part, striking the jury's award of punitive damages against the City and reducing the jury's award of compensatory damages for loss of professional opportunity from $125,000 to $99,188. In sum, after all of the post-trial maneuvering was concluded, the City was liable to Harris for compensatory damages of $41,712 on his § 1983 claim, $99,188 on the wrongful termination claim, back pay of $43,000, and reinstatement. Harris and the City both appealed.

II.

A public employee may not be discharged for exercising his or her First Amendment right to free speech. *Connick v. Myers,* 461 U.S. 138, 142 (1983); *Pickering* v. *Board of Educ.,* 391 U.S. 563, 574 (1968). In determining whether a discharged public employee has alleged a valid cause of action under § 1983, we are "to seek 'a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" *Connick,* 461 U.S. at 142 (quoting *Pickering,* 391 U.S. at 568). Under *Connick-Pickering,* the district court is to adhere to the following analytical structure:

> In order to establish a retaliatory discharge claim under the First Amendment, a public employee must meet a two pronged test. First, to trigger First Amendment protection, the speech at issue must relate to matters of public interest, *Connick v. Myers,* 461 U.S. 138, 146, 103 S.Ct. 1684, 1689, 75 L.Ed.2d 708 (1983), and the employee's interest in First Amendment expression must outweigh the employer's interest in efficient operation of the workplace. *Pickering v. Board of Education,* 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811 (1968). Second, the employee must demonstrate that his protected speech was a substantial factor in the employer's termination decision. *Mt. Healthy City Board of Education v. Doyle,* 429 U.S. 274, 287, 97 S. Ct. 568, 576, 50 L.Ed.2d 471 (1977).

Hanton v. Gilbert, 36 F.3d 4, 6-7 (4th Cir. 1994). Under this approach, the preliminary issue to determine is whether the speech touches upon a matter of public concern; if it does not, we go no further. *Holland v. Rimmer,* 25 F.3d 1251, 1255 n.ll (4th Cir. 1994).

Whether speech touches upon a matter of public concern under *Connick* and *Pickering is* a question of law for the district court and, accordingly, is reviewed de novo on appeal. *Hall v. Marion Sch Dist. No.* 2, 31 F.3d 183, 192 (4th Cir. 1994); *Holland,* 25 F.3d at 1255; *see also Shands v. City of Kennett,* 993 F.2d 1337, 1343 (8th Cir. 1993) (applying *Connick-Pickering* review de novo where issue raised for first time on appeal), *cert. denied,* 114 S. Ct. 880 (1994). As we have recently explained:

> Because almost anything that occurs within a public agency *could* be of concern to the public, we do not focus on the inherent interest or importance of the matters discussed by the employee. Rather, our task is to decide whether the speech at issue in a particular case was made primarily in the plaintiff's role as citizen or primarily in his role as employee. In making this determination, the mere fact that the topic of the employee's speech was one in which the public might or would have had a great interest is of little moment.

DiMeglio v. Haines, 45 F.3d 790, 805 (4th Cir. 1995) (quoting *Terrell v. University of Texas Sys. Police,* 792 F.2d 1360, 1362 (5th Cir. 1986), *cert. denied,* 479 U.S. 1064 (1987)). Whether Harris's speech fairly relates to an issue of public concern turns on the content, form, and context of the speech. *Connick,* 461 U.S. at 147-48.

It is evident from the record that Harris's conduct in this case provides a classic example of speech that does not touch upon a public concern under *Connick-Pickering.* Harris maintains that his supervisor's actions in this affair and the subsequent internal investigation were criminal in nature, and therefore, necessarily of public concern. We disagree. There is insufficient evidence in the record, as a matter of law, to show that in swearing out the complaint Harris was acting as a public citizen concerned with police corruption, as opposed to acting as a police officer-embroiled in a personnel dispute. We recently made clear that

> [b]y 1990, the Supreme Court had repeatedly emphasized that the *Pickering* doctrine

> developed to protect the right of a public employee "*as a citizen,* [to] comment[ ] upon matters of public concern." *Connick,* 461 U.S. at 143, 103 S. Ct. at 1688 (emphasis added). Although the Court had not expressly held that speech uttered within the employee's public capacity was not protected, the Court had distinguished between speaking as a citizen and as an employee, and had focused on speech as a citizen as that for which constitutional protection is afforded.

DiMeglio, 45 F.3d at 805; *see also Berger v. Battaglia,* 779 F.2d 992, 999 (4th Cir. 1985) (noting that our inquiry should determine "whether the 'public' or the 'community' is likely to be truly concerned with or interested in the particular expression, or whether it is more properly viewed as essentially a 'private' matter between employer and employee"), *cert. denied,* 476 U.S. 1159 (1986).[7]

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[7] The dissent essentially takes the position that today's opinion moves away from Fourth Circuit precedent concerning *Connick* and *Pickering* and stresses "context" to the exclusion of "content." However, it is the dissent that fails to interpret correctly the relevant trend in Fourth Circuit case law and the principles laid out in *Connick* and *Pickering.* Specifically the dissent completely fails to mention either the important analysis contained in *DiMeglio* or the holdings stressing the significant role that context plays in combination with content and form. *See, e.g., Dennison v. County of Frederick,* 921 F.2d 50, 54 (4th Cir. 1990) ("Although [plaintiffs] allegations appear to be of public interest, when they are considered in the context of what actually occurred . . . they are 'more properly viewed as essentially a "private" matter between employer and employee.'" (quoting *Berger v. Battaglia,* 779 F.2d 992, 999 (4th Cir. 1985), *cert. denied,* 476 U.S. 1159 (1986))), *cert. denied,* 501 U.S. 1218 (1991). This is not simply a look at the "subjective" intent of Harris, as the dissent would believe; on the contrary, it is an analysis of all the surrounding circumstances that play a role in determining what speech made by a public employee receives First Amendment protection. Thus, while content plays an important role, it by no means plays the only role in our determination.

The dissent, on the other hand, focuses almost exclusively on content without adequately taking into account surrounding circumstances. Thus, the dissent is left with the position that, as a matter of law,

Here, swearing out the criminal complaint dealt less with matters of police wrongdoing and more with Harris's criticism of the way his superiors treated his actions surrounding the underlying incident. While Harris's allegations of police corruption may have incidentally related to a public concern, nothing in the record indicates that this was Harris's primary objective in swearing out the complaint. In short, this speech simply does not concern a matter of police corruption; rather, this speech showed Harris's disagreement with his supervisor's discretionary decision not to pursue an investigation. As we have repeatedly made clear:

> If the speech relates primarily to a matter of "limited public interest" and does not "seek to bring to light actual or potential wrongdoing or breach of public trust," centering instead on matters primarily, if not exclusively "of personal interest" to the employee such as employee grievances over internal working conditions, etc., that fact must be weighed in determining whether a matter of true public concern is involved for the "First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs."

Jurgensen v. Fairfax County, 745 F.2d 868, 879 (4th Cir. 1984) (quoting *Connick, 461 U.S.* at 148-49).

"employees who expose corruption and illegality enjoy the protection of the First Amendment, regardless of motivation." Aside from the virtual absence of evidence in the record indicating that Harris was "exposing" any corruption whatsoever, the dissent crafts a rule of law that essentially eviscerates the more careful balancing laid out in *Connick-Pickering* and dictates that any allegations of corruption made by a public officer will survive summary judgment scrutiny.

In short, while we agree with the dissent that "[f]ew matters merit greater public concern than allegations of corruption, dishonesty, and illegality within the ranks of law enforcement," we will not blind ourselves to the surrounding circumstances to grant all allegations of corruption First Amendment protection.

Harris's position is further weakened by the manner and form in which he chose to direct his speech. The uncontroverted evidence establishes that Harris was under direct order not to pursue matters relating to the incident while on duty as an employee. Harris explicitly disregarded this directive. The primary example of this is Harris's decision to ignore the Captain's request that he not "pursue this matter further as a police officer," or take any action against Grey or Gamble while on duty. Harris disobeyed this order by swearing out the complaint while on duty and in a police uniform. Doing so was not only in violation of department orders, but also, by wearing his uniform, likely conveyed to the state magistrate tacit authority for issuing a criminal warrant to a police officer. Therefore, Harris's speech not only concerned what was essentially an employment dispute, but also was voiced in such a manner that indicated Harris was acting as a state employee rather than as a private citizen. Accordingly, based on the record before us, we conclude that, as a matter of law, Harris's swearing out of the criminal complaint against his supervisors did not touch upon a matter of public concern under *Connick-Pickering.*

A similar case from the Fifth Circuit involving internal police investigations and the application of *Connick-Pickering* further supports our reasoning. In *Gillum v. City of Kerrville,* 3 F.3d 117 (5th Cir. 1993), *cert. denied,* 114 S. Ct. 881 (1994), the plaintiff police officer learned from a reliable confidential informant that the city police chief had used drugs with a convicted felon. The officer pursued his own official investigation into the matter; at some point however, the officer was informed that he was relieved of his duties on the case because Internal Affairs would conduct a formal probe. Sensing a cover-up, the officer protested and eventually left the office stating that he would not compromise his badge. Although it was disputed whether the city terminated him or whether he resigned, the officer claimed that he had a protected First Amendment right to express his opinion concerning the case to his superiors. The Fifth Circuit disagreed, reasoning as follows:

> In *Terrell v. University of Texas Sys. Police,* 792 F.2d 1360 (5th Cir. 1986), *cert. denied,* 479 U.S. 1064, 107 S.Ct. 948, 93 L.Ed.2d 997 (1987), we did not focus on the inherent

> "importance" of the subject matter of the speech, but on the extent to which the terminated employee spoke as a citizen or employee. In *Terrell,* as in this case, the employee did not speak as a citizen, but as an employee embroiled in a personal employment dispute. *Id* at 1363. This focus on the hat worn by the employee when speaking rather upon the "importance" of the issue reflects the reality that at some level of generality almost all speech of state employees is of public concern.
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> * * * *
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> Whether [the police chief] broke the law is of public concern, but that was not [the officer's] focus. Instead, [the officer] disputes his role in the internal investigation. To be sure, corruption in an internal affairs department is a matter of public concern. [The officer's] focus was, however, on this issue only insofar as it impacted his wish to continue his investigation.

Gillum, 3 F.3d at 120-121. *See also McMurphy v. City of Flushing,* 802 F.2d 191, 196-98 (6th Cir. 1986) (police officer's accusations against his superiors made in spite did not touch upon a public concern under *Pickering*).

Likewise here, the record indicates that Harris swore out the warrant against his supervisor for his own personal vindication, and any interest he may have had in exposing police corruption was only incidental to his own personal grievance. Because Harris's swearing out of the complaint did not implicate a subject of public concern, as a matter of law, we reverse the district court's ruling to the contrary.[8]

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[8] Harris also argues that the district court erred in ruling that the defendants were entitled to qualified immunity in their individual capacities on the § 1983 claim. While the preference of this Circuit is to address the issue of qualified immunity prior to the merits, *DiMeglio,* 45 F.3d at 794-95 we must reach the merits of the First Amendment claim in this case because the City itself is a party. Since we have determined that the § 1983 claim against the City fails on the merits, we need not review

III

Both Harris and the City offer a number of arguments concerning the state law cause of action for wrongful termination, which is the only claim remaining after our previous discussion. The City's primary argument on appeal is that if the § 1983 claim fails, which we have so ruled, then the state law claim must also fail as a matter of law. In support of its argument, the City points to *Zicca v. City of Hampton,* 397 S.E.2d 882 (Va. 1990), and *Angle v. Overton,* 365 S.E.2d 758 (Va. 1988), for two propositions. First, the City maintains that any decision issued by a personnel board configured pursuant to Va. Code Ann. § 15.1-7.1 (Michie 1989) is binding on both parties. *Zicca,* 397 S.E.2d at 883. Second, the City contends that resort to the courts may be had only to the extent necessary to implement the board's decisions. *Angle,* 365 S.E.2d at 759. According to the parties, the district court ruled that while personnel board decisions might ordinarily be binding and non reviewable, an exception exists for cases involving constitutional claims. The City argues that because the constitutional claim fell, the personnel grievance board decision necessarily becomes binding and non-justifiable. However, we have no record on appeal of any such ruling and are now presented with not only the issue of the application of *Zicca* and *Angle* to this case, but also -- for the first time -- the validity of the state law claim where the accompanying constitutional claim has failed.

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the district court's ruling on qualified immunity against the individual defendants.

Harris further asserts that the district court erred in denying his motion to amend his complaint to include additional defendants. We also need not reach this issue. Harris does not include a copy of the motion, and argues in his brief only that the district court erred in denying the motion because the court erroneously concluded that the additional defendants were entitled to qualified immunity. Because Harris's argument only focuses on qualified immunity and he fails to include a copy of the motion in the joint appendix, we cannot do otherwise but presume that the motion presumably was only to add defendants to the § 1983 claim, and not the state law claim. Accordingly, for the same reasons as above, we do not review the district court's denial of Harris's motion to amend.

We believe the more appropriate course of action is to allow the district court the initial opportunity to address these issues, now presented for the first time because of our ruling. Our summary disposition of Harris's state law claim is in no way intended to limit the district court's focus or to predetermine its analysis on remand concerning the application of Virginia law in this case. However, on remand, the district court may also wish to consider any other relevant issues, such as whether to retain supplemental jurisdiction over Harris's state law claim.[9]

IV

For the reasons offered above, we reverse the district court's ruling that Harris had a protected First Amendment speech right in the actions he took in this case. We remand this matter to the district court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED

HEANEY, Senior Circuit Judge, dissenting:

Officer Brendhan Harris was fired from the City of Virginia Beach Police Department for standing before a magistrate and making allegations of criminal wrongdoing by a supervisor. So found the district court. By overturning the jury verdict in favor of Harris, this court compounds the wrong done to Harris when he was wrongfully terminated.

Few matters merit greater public concern than allegations of corruption, dishonesty, and illegality within the ranks of law enforcement. Because the majority opinion reaches a contrary conclusion, I dissent. I believe that a proper application of the principles of *Pickering v. Board of Educ.*, 391 U.S. 563 (1968), and its progeny, *see Rankin v.*

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[9] Because we remand the state law claim for further proceedings given the failing of the § 1983 action, we need not address various arguments put forward by Harris and the City as to damages awarded relating to the state law claim. These issues may well become moot based upon the district court's rulings on remand.

McPherson, 483 U.S. 378 (1987), *Connick v. Myers,* 461 U.S. 138 (1983), to the facts of this case requires that we affirm the jury's verdict in favor of Brendhan Harris.

I. *Threshold Inquiry: "Matters of Public Concern"*

The majority opinion concludes that, as a matter of law, Harris's statements to the magistrate accusing Van Auken of criminal conduct did not touch upon a matter of public concern. In so holding, the majority misconstrues the thrust of *Connick's* threshold inquiry into whether an employee's speech can be "fairly characterized as constituting speech on a matter of public concern." *Id* at 146. As a component of that test, *Connick* requires us to examine Harris's statements to the magistrate on the basis of their "content, form and context . . . as revealed by the whole record." *Id* at 147. As that phrase has been interpreted, "content" embodies the objective meaning of an employee's speech, while "context" refers, in part, to the subjective intent and motivation of the employee. The majority opinion not only errs by emphasizing context to the exclusion of content, but also errs in finding that Harris's principal motivation was personal in nature.

Connick states that we must determine whether Harris spoke "as a citizen upon matters of public concern," or, alternatively, "as an employee upon matters only of public interest." *Id* at 148. In making that assessment, courts have taken a variety of approaches to the relative weights to be accorded context and content. The Ninth Circuit has emphasized content, focusing on "'which information is needed or appropriate to enable the members of society' to make informed decisions about the operation of their government." *McKinley v. City of Eloy,* 705 F.2d 1110, 1113-14 (9th Cir. 1983) (quoting *Thornhill v. Alabama,* 310 U.S. 88, 102 (1940)). As the First Circuit has observed, the Ninth and Tenth Circuits, *see Koch v. City of Hutchinson,* 847 F.2d 1436 (l0th Cir.) (en banc), *cert. denied,* 488 U.S. 909 (1988), have effectively provided *"per se* protection to public-employee speech on certain topics of 'inherent' public interest, such as official malfeasance or abuse of office." *O'Connor v. Steeves,* 994 F.2d 905, 913 (lst Cir. 1993). At the other end of the speech spectrum, other courts have adopted a similar *per*

se rule for employee speech motivated *solely* by private concerns. *See, e.g., Callaway v. Hafeman,* 832 F.2d 414, 417 (7th Cir. 1987) ("[W]hile the content of [plaintiff's] communications touched on an issue of public concern generally . . . such speech stands unprotected from employer scrutiny when uttered in the pursuit of *purely* private interests.") (emphasis added).

In cases where the employee's speech is not so easily classifiable, some courts have emphasized the importance of the content of the speech. *See, e.g., Breuer v. Hart*, 909 F.2d 1035, 1039 (7th Cir. 1990) (content is "the greatest single factor in the *Connick* inquiry"); *Brawner v. City of Richardson,* 855 F.2d 187, 191-92 (5th Cir. 1988) (police department's alleged cover-up of internal investigations was "a matter of public interest and therefore deserves constitutional protection"). Others have concentrated on the employee's subjective intent. *See, e.g., Linhart v. Glatfelter,* 771 F.2d 1004, 1010 (7th Cir. 1985) *(Connick* "requires us to look at the *point* of the speech in question: was it the employee's point to bring wrongdoing to light? Or to raise other issues of public concern, because they are of public concern? Or was the point to further some purely private interest?").

Connick suggests that all three elements of the public concern test -- content, form, and context --should generally be considered in the analysis. More importantly for the purposes of this appeal, I find in *Connick* firm support for the proposition that certain statements, i.e., those touching on core First Amendment values or inherent public concerns, will survive the threshold test even if an employee may have been partially motivated by personal concerns. In *Connick,* an assistant district attorney circulated a questionnaire within her office "concerning office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns." 461 U.S. at 141. The Court ruled that the content of only one question touched upon a "matter of interest to the community" -- that concerning pressure to work in political campaigns. Though the assistant district attorney was motivated by her desire to avoid a transfer to another department, the Court nevertheless proceeded to evaluate that question in isolation, moving on to the balancing step in the *Pickering* analysis. *Id.* at 149-154. The First Circuit has commented:

> The separate treatment given the one item of "inherent public concern" on the employee questionnaire is consistent with our exempting such clear First Amendment speech from the full-scale threshold inquiry into the employee's motives in speaking, undertaken in *Connick* in relation to the other items on the questionnaire.

O'Connor, 994 F.2d at 914 n.5. The Third Circuit has taken a similar view: "Were motivation rather than content dispositive [in *Connick*], the Court would have had no reason to isolate the one question that was of public concern." *Zamboni v. Stamler*, 847 F.2d 73, 78 (3rd Cir.), *cert. denied*, 488 U.S. 899 (1988).

In contrast to today's decision, the Fourth Circuit has previously aligned itself firmly with the "content-based" view: "Although the *Connick* court did not elaborate on the relative weight to be accorded these three factors, this court has held that 'content, subject-matter, is always the central aspect.'" *Arvinger v. Mayor of Baltimore*, 862 F.2d 75, 79 (4th Cir. 1988) (quoting *Jackson v. Bair*, 851 F.2d 714, 720 (4th Cir. 1988)). Accordingly, I cannot concur in the majority opinion's analysis to the contrary.

The majority opinion's narrow focus on subjective intent to the exclusion of objective content generates perverse incentives for corrupt government officials to take aggressive disciplinary action against employees who learn of their misdeeds. Suppose, for example, that two employees of a government agency suspect illegality on the part of superiors. Employee A makes public disclosure of his knowledge. Employee B investigates and opposes her superiors' actions within the agency and threatens to go public if the practices are not stopped. Her actions are rewarded with a bogus letter of reprimand and other internal disciplinary measures devised by her corrupt superiors, and only then does she decide to go public with her knowledge. Both employees are fired after speaking publicly. Even if Employee A and Employee B were to say the same words, it would be less likely that Employee B's speech would be held to touch on a matter of public concern because she would appear to be acting in response to the disciplinary actions. Confronted with a potential whistleblower, the corrupt official may believe that he can

later fire that employee with relative impunity if he first fabricates an internal job-related dispute before the employee goes to the public in order to create a presumption of self-interested motivation. By making employee motivation dispositive of the threshold *Connick* test, the majority opinion contradicts not only *Connick*, but common sense.

In my view, the statements made by Harris to the magistrate fall within the category of speech of such inherent public concern that it is entitled to First Amendment protection. "[S]peech disclosing public corruption is a matter of public interest and therefore deserves constitutional protection." *Solomon v. Royal Oak Twp.*, 842 F.2d 862, 865 (6th Cir. 1994). Harris stated to the magistrate that Van Auken was guilty of criminal misconduct for ordering Gamble released from custody, withholding service of the Grey warrant, and making false statements to the court to secure the dismissal of the Gamble case. The majority finds no evidence in the record that Harris was motivated by a concern for police corruption. In my view, there was no evidence in this record that Harris was motivated solely by personal interests. To the contrary, my review of the record convinces me that Harris was motivated by both private and civic impulses: He was angry that he had been wronged by his superiors, but also by the fact that his superiors' actions had, he believed, been in violation of the law. If his superiors did, in fact, break the law, then it should make no difference whether the person blowing the whistle was a victim of the criminal conduct or merely a disinterested bystander. "Wrongdoing may often be revealed to the proper authorities only by those who have a personal stake in exposing wrongdoing." *Breuer*, 909 F.2d at 1039. In sum, I maintain, as have several of our sister circuits in recent years, that employees who expose corruption and illegality enjoy the protection of the First Amendment, regardless of motivation. *See, e.g., Orange v. District of Columbia, 59* F.3d 1267, 1272-73 (D.C. Cir. 1995); *Feldman v. Philadelphia Hous. Auth.*, 43 F.3d 823, 829 (3rd Cir. 1994); *Swineford v. Snyder County Pa.*, 15 F.3d 1258, 1272 (3rd Cir. 1994); *Powell v. Gallentine*, 992 F.2d 1088, 1091 (10th Cir. 1993).

The City makes much of the fact that Harris appeared before the magistrate in uniform, thus violating a direct order of a superior officer. This fact has little or no bearing on the threshold *Connick* inquiry. Whether Harris's violation of the order would have furnished an independently sufficient ground

for his dismissal is a component of the second *Connick* prong, which incorporates the burden-shifting regime of *Mt. Healthy City Sch. Bd. of Educ. v. Doyle,* 429 U.S. 274 (1977), and which was a question of fact decided by the jury.

For these reasons, I would hold that, as a matter of law, Harris's statements to the magistrate touched on a matter of public concern and therefore merit the protection of the First Amendment.

II. *Causation Inquiry*

The City does not appear to contest that Harris's exercise of his right to speak to the magistrate about illegal acts by superiors was a substantial factor in its decision to terminate. *See Mt. Healthy,* 429 U.S. at 287. The jury found in favor of Harris on this prong of the *Connick-Pickering* regime, and did not accept the City's theory that Harris's insubordination in itself would have resulted in his termination.

III. *Balancing of Interests*

The third prong of the *Connick-Pickering* test requires courts "to balance the significance of the interests served by public-employee speech -- including the employee's interests in communicating, and the interests of the community in receiving, information on 'matters of public importance' -- against the governmental employer's legitimate interests in preventing unnecessary disruptions and inefficiencies in carrying out its public service mission." *O'Connor,* 994 F.2d at 915 (citing *Pickering,* 391 U.S. at 568-575). The district court ruled that Harris's "interest in speech before the magistrate clearly outweighed the City of Virginia Beach Police Department's interest in the effective and efficient fulfillment of its responsibilities." The court elaborated:

> Of critical importance the court finds here in speaking before the magistrate plaintiff Harris sought to fulfill the very oath that he had taken as a police officer to arrest and seek to bring to justice those whom he had suspected that had committed crimes ....

Against Harris's interest in reporting, and the community's interest in learning about, alleged criminal activity, the district court balanced the police department's legitimate interest in maintaining efficiency and morale. In making this determination, the court dismissed the City's argument that Harris had abused his position by noting that he had broken no law in appearing before the magistrate and that the order requiring him not to so appear was of "dubious legality." The court found that "it was more likely the police officials' conduct . . . would serve to undermine the effective and efficient management [of the department]." I agree.

Harris, after all, made an allegation not of mere incompetence or wasteful spending, but of *criminal* wrongdoing by one of those entrusted to enforce the laws. We need not fear a flood of litigation against police supervisors if Harris's verdict were allowed to stand, because any officer making a false or reckless allegation would be subject to dismissal on that basis. Assuming that criminal activity by police officials is rare, so too would be suits such as Harris's. There is little likelihood that many officers would risk termination by making false or reckless allegations. In my view, the balance of competing interests under *Pickering* favors Harris and the public disclosure of allegations of police corruption. *See, generally, Wulf v. City of* Wichita, 883 F.2d 842, 860-62 (10th Cir. 1989). Accordingly, I would affirm the district court.

IV. *Conclusion*

Because I agree with the district court that Harris has satisfied each of the elements of the *Connick-Pickering* test for public employee retaliatory discharge claims, I would affirm the jury verdict returned below.

On all other issues raised by the parties but not reached in the majority opinion, I would affirm the rulings of the district court.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

BRENDHAN B. HARRIS,

Plaintiff,

v.

CITY OF VIRGINIA BEACH, et al.,

Defendants.

ACTION NO. 2:93cv1151

Entered: May 13, 1994

MEMORANDUM OPINION

Plaintiff Brendhan B. Harris filed this action under Title 42 U.S.C. § 1983. He alleges he was fired from his position as an officer with the Virginia Beach Police Department for exercising his constitutionally protected right to speak out on a matter of public concern.[1] Plaintiff seeks judgment against the City and numerous Police Department and City officials for lost income, benefits, and future professional opportunities, reinstatement, punitive damages in the amount of $350,000, attorney's fees, costs, expenses, interest, and expungement of his personnel record. Having denied defendants' motion for summary judgment from the bench, the Court today issues a memorandum opinion in place of its oral order and rules on plaintiff's oral countermotion for summary judgment. The Court also rules on plaintiff's motions to add additional parties as defendants.

I. BACKGROUND

On August 28, 1992, plaintiff responded to a call from Terry Gray at the Lake Edward Apartment complex in Virginia Beach. Gray informed Harris that an intruder had

[1] Plaintiff also brings a state law claim for wrongful discharge which is not in issue in this proceeding.

been in her apartment and had claimed to be a maintenance worker. (Def. Exh. pp. 402-03). Harris went to speak to the Apartment Manager, Coletta Goodfellow, who informed him that maintenance had been scheduled for Gray's apartment. Goodfellow retrieved the work order and Harris and Goodfellow went to speak to Gray, who had been joined by her sister, Deirdre Gamble. At this point, Gray snatched the work order from Goodfellow's hand. When she refused to return it Harris grabbed her wrist. (Def. Exh. pp. 404-09). Gamble jumped in and a fist fight ensued between Harris and Gamble. Harris eventually pepper gassed Gamble and was able to subdue and arrest her. Harris proceeded to the Magistrate's office to swear out warrants against Gamble and Gray. (Def. Exh. pp. 406-10, 415-16).

Lt. Gary Van Auken directed Harris to release Gamble to the custody of internal affairs, and not to cause a warrant to be issued against her. (Def. Exh. p. 44). Harris consulted the police union's attorney, who advised Harris to swear out the warrants immediately so that the warrants did not appear to be in retaliation for their testimony to internal affairs. (Def. Exh. pp. 415-18). Harris gave a statement to internal affairs, and then swore out the warrants.[2] He gave the warrants against Gamble to another officer, who subsequently served them. (Def. Exh. pp. 418-19). Harris kept the warrants against Gray until August 30, when he delivered the warrants to Lt. Van Auken pursuant to directions from Captain Rorrer. (Def. Exh. pp. 424-26).

Gamble's trial date was September 29, 1992. Van Auken appeared at the trial and informed the judge that the City Attorney's office wanted to nol pros the charges. To support that position, he gave the judge a letter dated Sept. 29, 1992, which was purportedly from Capt. M.E. Beane to William Byman of the City Attorney's Office. (Def. Exh. pp. 135-137, 143).

Harris eventually received a four hour suspension from duty in response to a citizen's complaint Ms. Gray lodged against Harris for his actions on August 28, 1992. (Def. Exh. pp. 267-72, 277-91). Plaintiff also received a four hour

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[2] There is dispute about whether this action actually violated Van Auken's order, since Harris alleges he was only ordered not to swear out the warrants until internal affairs had interviewed Gamble. (Def. Exh. 44, 416, 425-26).

suspension and oral counseling for obtaining the warrants in violation of Lt. Van Auken's orders. (Def. Exh. pp. 277-91) . For his part, Harris pursued an internal grievance against Van Auken. On January 25, 1993, Harris received a letter from Capt. Campbell, which told Harris that the internal investigation into his allegations against Van Auken concluded that they were not supported by the evidence. (Def. Exh. p. 266). His request to have those allegations brought before a citizen's review board was denied on March 9, and his appeal of the disciplinary action was continued on July 29, 1993. (Def. Exh. pp. 473-77) .

Allegedly fearing that any criminal action against Van Auken would soon be precluded by the statute of limitations, plaintiff, in his capacity as a police officer, (Harris Dep. pp. 116-17), appeared before a Magistrate on July 30, 1993 and apparently told him about Van Auken's possession of and refusal to serve the warrants against Ms. Gray. Harris also asserted to the Magistrate that the General District Court relied upon the letter which Van Auken submitted to the Court and that the letter contained statements the plaintiff knew to be false. (Def. Exh. pp. 298-301).[3] The Magistrate found

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[3] The first paragraph of the letter states that the Commanding Officer ("C.O.") of the Third Precinct reviewed the arrest and found it unwarranted. (Def. Exh. 143). However, Harris had received a letter dated Sept. 30 from the C.O. stating he had not yet completed his review. (Def. Exh. at 127-8). The letter also states that none of the witnesses supported Harris' version of the events. However, Harris argues that Ms. Goodfellow did support his view, (her interview with Internal Affairs seems to confirm this), and that she was at the court to testify on Harris' behalf the day Van Auken nol prossed the charges and actually scolded Van Auken for lying to Harris by telling him she did not support his version. Plaintiff contends this occurred just prior to Van Auken giving the letter to the judge, and therefore Van Auken knew the letter was untrue when he submitted it. Moreover, Officer Colley stated in his Internal Affairs interview that according to her own version of the events, Ms. Gamble had committed two crimes. Also, the letter claims the Commonwealth's Attorney ("C.A.") determined Harris acted improperly. He, however, was apparently never consulted, although an assistant C.A. was. (Def. Exh. at 486). (The C.A. has stated he believes this was just an erroneous, although entirely common, use of his title to refer to the entire office.) Additionally, the letter purports to be from Capt. Beane. However, Beane admits that Van Auken wrote the letter and put Beane's initials on it without Beane having

probable cause to charge Van Auken with delay in executing process and obstruction of justice.

On August 19, 1993, plaintiff received a letter from Chief Wall notifying him that he had been fired. (Def. Exh. p. 309). On September 2, 1993, Harris had a hearing before the Personnel Review Board. His termination was affirmed by the Board and therefore became final on September 7. Plaintiff was officially fired for misuse of authority and for violating a letter from Capt. Rorrer. (Def. Exh. pp. 302-4). The letter from Captain Rorrer cited by defendants as a direct order, (Def. Exh. pp. 127-8), clearly forbids further action by Harris in his official, (but not his personal), capacity against Ms. Gamble and Ms. Gray. The letter's application to action against Lt. Van Auken, however, is not clear from the text, and plaintiff asserts that it did not apply.

In going before the magistrate, plaintiff also allegedly violated a direct verbal order from Capt. Baker and an order contained in the Jan. 25, letter from Capt. Campbell.[4] The letter from Campbell, in addition to informing Harris that the internal investigation concluded his allegations against Van Auken were unfounded, also told him that if he had any questions, he should see his superior, Major McCloud. (Def. Exh. p. 266). Harris, however, alleges he sent a memo to Campbell, (Def. Exh. pp. 433), which he contends constituted compliance with Campbell's order. Plaintiff also had already informed McCloud on Oct. 17, 1992 of his intention to obtain warrants if his complaints were not addressed (Def. Exh. p. 136) and had received no response. However, this was, of course, before the internal investigation was completed and before plaintiff received Campbell's letter.[5]

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seen it. Beane further stated that he would not have signed the letter in that form due to the inaccuracies. (Defendants' Exh. at 328).

[4] Baker did not bring disciplinary charges against Harris, although that order may have been considered in Harris' hearing. (Def. Exh. p. 781-2).

[5] Harris was not terminated for violating Campbell's "order" but was given a thirty day suspension, which was concurrent with his termination for violating Rorrer's letter. This letter, however, is relevant to a consideration of the circumstances surrounding plaintiff's dismissal.

II. STANDARD OF REVIEW

Rule 56(c) provides that a moving party is entitled to summary judgment "if the pleading, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party moving for summary judgment is initially responsible for identifying those portions of the factual record which it believes establish that there are no genuine issues of material fact. Once the moving party has made this showing, the opposing party must demonstrate, by reference to affidavits, depositions, answers to interrogatories, or admissions, that a triable issue of fact exists. See Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986). In deciding a motion for summary judgment, the court is required to view the facts and draw reasonable inferences in a light most favorable to the non-moving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). Should the non-moving party present a genuine issue of fact that could lead to a reasonable jury finding, the motion for summary judgment must be denied. Id.

III. DISCUSSION

A. Motion for Summary Judgment

The law governing the legality of firing public employees for their speech in light of First Amendment concerns is dominated by Pickering v. Board of Education, 391 U.S. 563 (1968) and Connick v. Meyers, 461 U.S. 138 (1983). These cases establish that, given the legitimate interest of government entities in limiting the speech of their employees, such employees are not entitled to the same level of First Amendment protection as the general population. Pickering, 391 U.S. at 568 (1968).

In order to prevail on a claim of wrongful discharge in violation of free speech rights, a plaintiff must meet the requirements of each prong of a three prong test established by Connick and Pickering and their progeny. The first step in the analysis is to determine whether the speech in question implicates a matter of public concern. If it "cannot be fairly considered as relating to any matter of political, social, or

other concern to the community," the government has wide discretion to dismiss its employees without fear of judicial review on First Amendment grounds. Connick, 461 U.S. at 146-147.

"Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." Id. at 147-8. Of these, content "is always the central aspect." Arvinger v. Baltimore, 862 F.2d 75, 79 (4th Cir. 1988). In order to be protected, the speech "must relate to wrongdoing or a breach of trust, not ordinary matters of internal agency policy. . . [P]ersonal grievances about working conditions do not qualify as matters of public concern." Daniels v. Quinn, 801 F.2d 687, 690 (4th Cir. 1986). "[S]peech in the public interest by a public spirited citizen is entitled to greater protection than speech in the interest of the speaker." Joyner v. Lancaster, 815 F.2d 20, 23 (4th Cir. 1987), *cert. denied,* 484 U.S. 830 (1987). "[A] statement that involves private interests of any kind, and that is otherwise devoid of public concern, is not entitled to protection." Arvinger 862 F.2d at 79. "The inquiry into the protected status of speech is one of law, not fact." Connick 461 U.S. at 148, fn.7.

If the speech does implicate a matter of public concern, the employee "bears the burden of demonstrating that protected speech was a motivating factor in the discharge. The burden then shifts to the employer to show that it would have reached the same decision even in the absence of the protected conduct." Daniels, 801 F.2d at 689, citing Mt. Healthy v. Doyle, 429 U.S. 274, 287 (1977). This is a question of fact. Id.

If the plaintiff can demonstrate that he would not have been fired but for the speech, the third prong of the test is "whether the employee's interest in the speech was outweighed by the employer's 'interest in the effective and efficient fulfillment of its responsibilities to the public.'" Joyner, 815 F.2d at 23 (4th. Cir. 1987) (quoting Connick, 461 U.S. at 150). The factors to be considered in performing this balancing analysis include the employer's interest in "discipline and harmony in the workplace, confidentiality, protection from false accusations that may prove difficult to counter given the employee's supposed access to inside information, freedom to discharge an employee whose speech has impeded the proper performance of his duties or is so lacking in foundation as to call his competence into question, and protection of close

working relationships that require loyalty and confidence." Piver v. Pender County Bd. of Educ., 835 F.2d 1076, 1081 (4th Cir. 1987), *cert. denied*, 487 U.S. 1206 (1988), (citing Pickering, 391 U.S. at 568-73). Other relevant factors are "the time, place and manner of the speech; the context in which the dispute arose; [and] the degree of public interest in the speech." Id., citing Connick, 461 U.S. at 150-53. The Supreme Court, however, has twice noted that, "because of the enormous variety of fact situations in which critical statements by . . . public employees may be thought by their superiors . . . to furnish grounds for dismissal, we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged." Connick, 461 U.S. at 154, quoting Pickering, 391 U.S. at 569. The responsibility to determine which interest is more weighty in light of the above stated factors falls upon the Court, since "the entire balancing process is an inquiry of law." Joyner, 815 F.2d at 23.[6]

Defendants allege that plaintiff's claim must fail under all three prongs of the analysis. First, defendants assert that the speech in issue, plaintiff's statements to the magistrate, (Def. Exh. pp. 298-99), does not raise an issue of public concern, because plaintiff's actions solely related to and were motivated by a personal employment grievance. The Fourth Circuit's observation that the content of the speech is the most important aspect of the Connick analysis, Arvinger, 862 F.2d at 79, is crucial in this regard. The Seventh Circuit has observed:

> The finding that a speaker was motivated by narrow self interest may in itself strongly suggest that his speech involved a private dispute. Yet such a finding alone cannot disqualify a speaker from protection. Wrongdoing may often be revealed to the proper authorities only by those who have some personal stake in exposing wrongdoing. Breuer v. Hart, 909 F.2d 1035, 1038-9 (7th Cir. 1990).

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[6] At oral argument, the Court inadvertently stated that this is a question of fact for a jury to decide. The Court is cognizant that this statement was in error.

The Court does not believe, however, that this clearly is a case solely involving "narrow self interest". Plaintiff's testimony before the Personnel Review Board would at least suggest otherwise.

> This is not an isolated incident[7]. . . Finally, a man has to take a step and just say where does the integrity lie in this police department? Am I supposed to roll over and be just as corrupt as the rest of them by keeping my mouth shut and let them go on doing their illegal things, or am I going to make a stand. . . **for every other cop that's out here working for Virginia Beach that has to go through what I go through. . .** I know they're going to frown at me. They're going to yell at, and they may even try and fire me, but it's the right thing to do. It's just a matter of integrity. (Def. Exh. pp. 429-30, (emphasis added). See also (Def. Exh. pp. 475-478).

Although this may be a self-serving statement, it does raise significant questions in the mind of the Court regarding the motivations upon which plaintiff's actions were based.

Furthermore, despite the defendants' protestations to the contrary, the plaintiff's allegations that a police Lieutenant lied to a judge in order to effectuate a nol pros of charges, and wrongly refused to serve warrants clearly relates to "wrongdoing or a breach of trust" and is of obvious public concern. The very fact that the magistrate issued the warrants upon a finding of probable cause to believe Van Auken's actions were criminal supports plaintiff's position, since the Court believes that an allegation of potentially *criminal* activity on the part of a police officer in the administration of justice is of the highest public concern.[8]

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[7] Plaintiff alleged before the Personnel Review Board that Van Auken performed other illegal acts; specifically he ripped up tickets. (Def. Exh. pp. 429, 477).

[8] The fact that Van Auken was eventually acquitted of these charges is irrelevant. The plaintiff need not have been correct in his assertions to the magistrate in order for those assertions to be considered protected speech. Rather, if the speech is on a matter of public concern, the balancing test

Defendants rightly point out that the form of expression here is action, not mere speech. This, however, is not dispositive. See e.g. Wulf v. Wichita, 883 F.2d 842 (lOth Cir. 1989) (Officer's writing letter to AG requesting investigation of police chief held to be matter of public concern which outweighed employer's interest in discharging him). The Court finds it significant that the plaintiff went through Department channels before he went to the magistrate, and only went to the magistrate when he feared the statute of limitations was running out.[9] Although this does not necessarily suggest that his motivations were proper, it does suggest that his response was at least proportional to the response he received from the Department. Therefore, this speech, which may or may not have been uttered for purely personal reasons, but which was intended to remedy the potentially criminal activity of a law enforcement officer, clearly implicates a matter of public concern. The Court finds that the speech easily meets the requirements of the first prong of the test.

Since defendants allege plaintiff was actually fired for disobedience of order and abuse of position, they assert plaintiff's claim fails under the second prong of the analysis. Defendants' testimony clearly indicates that plaintiff's speech before the magistrate was the action that, in the Department's view, constituted disobedience and abuse of position. (McCloud, Pl. Exh. D, pp. 42-44, 48), (Van Auken, Pl. Exh B, p. 6), (Wall, Pl. Exh. E, p. 18). Both official grounds for plaintiff's dismissal relate to the fact that Harris appeared before the Magistrate in uniform. The Disobedience of Order charge was based upon Rorrer's letter, (Def. Exh. pp. 127-8), which clearly barred plaintiff from taking any further action in the Gamble matter as a police officer, but specifically allowed him to proceed a private citizen. The Court again notes, however, that plaintiff contends that this letter applied only to actions against Gamble and Gray, and did not concern actions against Van Auken.

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applies unless there is proof that the statements were both false and knowingly or recklessly made. Pickering 391 U.S. at 574.

[9] The Court in Clary v. Irvin, 501 F.Supp. 706 (E.D. Texas 1980) felt it was important that the complaint was registered with a body that had the power to remedy the situation. This observation seems relevant here as well.

The Abuse of Position charge claimed that "Officer Harris wrongfully used his position to avoid consequences of his improper actions; i.e., to obtain magistrates summonses which might not otherwise have been issued." (Def. Exh. p. 302). The Court finds this charge confusing. Moreover, to the extent that the charge is grounded in the notion that a Magistrate would issue warrants to an officer in his official capacity that he would not to an officer in his personal capacity, the charge is utterly meritless. Magistrates issue warrants based upon whether the testimony indicates there is probable cause to believe a crime has been committed, not based upon the occupation of the person testifying.

If plaintiff can demonstrate that Rorrer's order did not apply to Harris' action, and that appearing before the Magistrate in uniform cannot be said to have been an abuse of position, then Harris would almost certainly be able to show that his dismissal was actually for his speech and he would prevail on the second prong. Even if plaintiff cannot demonstrate that the reasons for his dismissal were meritless, but can demonstrate that the mere fact that he went before the magistrate, independent of the fact that he did so in uniform, was a "substantial" or "motivating factor" in his dismissal, then plaintiff will have shifted the burden to the defendants to show that it would have reached the same decision for reasons independent of the protected conduct. Mt. Healthy, 429 U.S. at 287. To meet that burden, the defendants essentially would need to prove by a preponderance of the evidence their assertion that plaintiff was actually fired for speaking out *in an improper manner.*[10] Since an employee can be appropriately fired for exercise of valid First Amendment rights through improper means, See Pierson v. Grafton, 799 F.Supp. 596, 599-600 (N.D.W.Va. 1992) (upholding the firing for insubordination of a public employee who ignored applicable rules requiring utilization of the chain of command for grievances), such a showing by the defendants would probably be sufficient to meet its burden.

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[10] Defendants cannot be heard to argue that he was fired for disobeying orders *not to speak*, since the Court cannot countenance an employer's firing of an employee solely for violation of orders not to speak when the speech itself was protected by the First Amendment. To do so would, for all intents and purposes eviscerate the Connick regime.

The Court cannot say as a matter of law that a reasonable jury cannot find that the official grounds for Harris' dismissal were meritless. The Court also can neither say that the plaintiff is incapable of meeting its initial burden nor that the defendant is incapable of meeting its shifted burden. Therefore a genuine issue of material fact exists as to the motivation for Harris' discharge and summary judgment is not appropriate on the second prong.

The third prong of the analysis involves weighing the value of the speech against the employer's need to be able to fulfill its duties to the public. The employee can be legally fired for speech on a matter of public concern if the employer's interest in fulfilling its responsibilities to the public outweighs the employee's interest in the speech. Joyner 815 F.2d at 23. The Fourth Circuit has noted that the tolerance to be expected from the employer varies along a spectrum according to the nature of the job at issue. Jurgensen v. Fairfax County, Va., 745 F.2d 868, 881 (1984). Specifically, "the discipline demanded of, and freedom correspondingly denied to policemen" places them at the most restricted end of the range of permissible limitation. Id. This observation is tempered somewhat by the fact that "a low-level non-supervisory employee obviously can criticize a sheriff's office more vigorously than a person in a policymaking supervisory position." Pierson v. Gondles, 693 F.Supp. 408, 415 (E.D.Va. 1988). Clearly, however, allowing an officer to bring an obstruction charge against a superior whenever he felt his performance was hindered would be a totally unworkable situation. Therefore, the Court has no doubt that Harris' actions potentially constituted a serious threat to the Virginia Beach Police Department's legitimate interest in maintaining efficiency and morale.[11]

The extent to which a public employer must allow a potential disruption of the office to become obvious before that employer can take action is a function of the extent to

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[11] On the other hand, it should be noted again in this context that plaintiff originally brought his complaint through the Department, and only went to the magistrate when he felt the Department was avoiding the issue and the statute of limitations was running out. (Def. Exh. 427-29, 473-78). This would tend to suggest that plaintiff sought to minimize the type of deleterious effects about which defendants now complain.

which the speech in question involves matters of public concern. Connick, 461 U.S. at 152. ("[W]e do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action. We caution that a stronger showing may be necessary if the employee's speech more substantially involved matters of public concern [than the speech before the Court].") Id. In this case, the Court finds that the circumstances surrounding Harris' dismissal are not sufficiently clear from the record to decide which interest is of greater importance without the benefit of live testimony afforded by trial.

B. Motions to Add Defendants

Plaintiff has filed two motions to amend his First Amended Complaint. In his Motion for Leave to File Second Amended Complaint, the plaintiff seeks to add as defendants Randall Blow and William Byman, Assistant City Attorneys for the City of Virginia Beach, Virginia. In plaintiff's Motion for Leave to File Third Amended Complaint, he seeks to add as a defendant Oral Lambert, the Assistant City Manager. Defendants oppose both motions.

Rule 21 governs these motions, and it is within the sound discretion of the court to decide whether or not to permit joinder. Gilbert v. Gen. Elec. Co., 347 F. Supp. 1058 (E.D. Va. 1972), Crews v. Blake, 52 F.R.D. 106, 107 (S.D. Ga. 1971). The Court finds that the addition of Blow, Bynum, and Lambert is not justified since each is entitled to qualified immunity for actions against them in their personal capacity and their presence as parties adds nothing to the plaintiff's case.

Under the qualified immunity doctrine, if the plaintiff has not provided more than "bare allegations of malic[ious intent], . . . government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 817-818 (1982).

> If the law at [the time the action occurred] was not clearly established, an official could not

> reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful. Until this threshold immunity question is resolved, discovery should not be allowed. Id., at 818.

Additionally, "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson v. Creighton, 483 U.S. 635, 640 (1987). The issue is an "essentially legal question" and "the entitlement is an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." Mitchell v. Forsyth, 472 U.S. 511, 526 (1985).

The correct outcome of a Connick analysis is extremely fact specific. The challenges obviously faced by public employers due to this consideration have led other Circuits to expressly conclude that qualified immunity should rarely be denied in Connick cases. Bartlett v. Fisher, 972 F.2d 911, 916-17 (8th Cir. 1992). McDaniel v. Woodard, 886 F.2d 311, 314 (llth Cir. 1989); Noyola v. Texas Department of Human Resources, 846 F.2d 1021, 1025 (5th Cir. 1988); Benson v. Allphin, 786 F.2d 268, 276 (7th Cir. 1986), cert. denied 479 U.S. 848 (1986); But See Roth v. Veteran's Admin. of Government of U.S., 856 F.2d 1401 (9th Cir. 1988). These cases suggest that only where the case law contained fact patterns which "closely correspond" to the one at issue can it be considered that the law clearly established that the Connick balancing test forbade the firing. Bartlett, 972 F.2d at 916, quoting Benson, 786 F.2d at 276. While the Court must look to precedent on a given fact pattern, the gray area in the law in this type of case is rather large, and "[o]fficials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines." Maciariello v. Sumner, 973 F.2d 295, 298 (4th Cir. 1992), cert. denied, -- U.S. --, 113 S.Ct. 1048 (1993).

The Court has been able to find no precedent arising out of similar circumstances. The facts of this case, even when viewed in a light most favorable to the plaintiff, raise difficult legal issues involving the subtle balancing of important, competing concerns. Given this, the Court itself is unable to conclude at present that defendants even violated plaintiff's

rights. Therefore, this Court cannot conclude that the applicable law is sufficiently clear that a reasonable official in the shoes of the individuals plaintiff now seeks to add would understand that firing Harris violated Harris' rights. Moreover, the plaintiff certainly has not provided more than bare allegations of malicious intent on the part of these individuals and so there is no basis upon which to allow suit against them to proceed despite the fact that the law was not clearly established. Therefore, these individuals are entitled to qualified immunity for suits against them in their individual capacity. Furthermore, since "official-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent," Monell v. Dept. of Social Services, 436 U.S. 658, 690 fn. 55 (1977), and since the City is already a named defendant in this case, the addition of these individuals in their official capacity adds nothing to plaintiff's cause of action. Joinder would therefore be futile and is thus not warranted.

IV. CONCLUSION

On the first prong of the Connick-Pickering analysis, the Court has found as a matter of law that Harris' speech was of public concern. On the second prong, the Court concludes from the evidence that the issue of whether plaintiff was fired for protected conduct presents a genuine issue of material fact upon which a reasonable jury could find for the defendants or for the plaintiff. Moreover, the Court cannot balance the competing interests to be weighed in the third prong without the further development of the evidentiary record that can only be achieved at trial. Since the second and third prongs of the analysis cannot be resolved at this juncture, summary judgment is not appropriate, either for the defendants or for the plaintiff. Accordingly, both motions are DENIED. Additionally, the Court finds that the joinder of additional defendants would be futile. Accordingly, plaintiff's motions to add defendants are DENIED.

The Clerk is DIRECTED to send a copy of this order to counsel for plaintiff and the defendants.

IT IS SO ORDERED.

/s/
United States District Judge

Norfolk, Virginia
May 3 , 1994

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 94-2091
CA-93-1151-2

Entered: November 27, 1995

BRENDHAN B. HARRIS

Plaintiff - Appellee

v.

THE CITY OF VIRGINIA BEACH

Defendant - Appellant

and

G. M. VAN AUKEN, III, Lieutenant; M. E. BEANE, Captain; W. W. BAKER; D. G. MCCLOUD, Major; CHARLES R. WALL, Individually and as Officer of the Department of Police, City of Virginia Beach, Virginia; FAGAN D. STACKHOUSE, Individually and as the Director of the Department of Human Resources, City of Virginia Beach, Virginia; JAMES K. SPORE, Individually and in his official capacity as City Manager of the City of Virginia Beach, Virginia

Defendants

No. 94-2122
CA-93-1151-2

BRENDHAN B. HARRIS
Plaintiff - Appellant

v.

THE CITY OF VIRGINIA BEACH; G. M. VAN AUKEN, III, Lieutenant; M. E. BEANE, Captain; W. W. BAKER; D. G. MCCLOUD, Major; CHARLES R. WALL, Individually and as Officer of the Department of Police, City of Virginia Beach, Virginia; FAGAN D. STACKHOUSE, Individually and as the Director of the Department of Human Resources, City of Virginia Beach, Virginia; JAMES K. SPORE, Individually and in his official capacity as City Manager of the City of Virginia Beach, Virginia
Defendants - Appellees

On Petition for Rehearing with
Suggestion for Rehearing In Banc

The appellee/cross-appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague
CLERK

Supreme Court, U.S.
FILED
MAR 14 1996
CLERK

No. 95-1380

In The Supreme Court of the United States

October Term 1995

BRENDHAN B. HARRIS,
Petitioner

v.

THE CITY OF VIRGINIA BEACH, et. al.,
Respondents

On Petition For Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

AMICUS CURIAE BRIEF OF SOUTHERN STATES POLICE BENEVOLENT ASSOCIATION IN SUPPORT OF THE PETITIONER'S PETITION FOR A WRIT OF CERTIORARI AND MOTION FOR LEAVE TO FILE THE ATTACHED AMICUS CURIAE BRIEF

J. Michael McGuinness*
McGuinness & Parlagreco
236 North Poplar Street
P.O. Box 952
Elizabethtown, N.C. 28337
910-862-7087
*Counsel of Record

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BRENDHAN B. HARRIS,
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MOTION OF SOUTHERN STATES POLICE BENEVOLENT ASSOCIATION FOR LEAVE TO FILE THE ATTACHED AMICUS CURIAE BRIEF IN SUPPORT OF THE PETITIONER'S PETITION FOR A WRIT OF CERTIORARI

J. Michael McGuinness*
McGuinness & Parlagreco
236 North Poplar Street
P.O. Box 952
Elizabethtown, N.C. 28337
910-862-7087
*Counsel of Record

MOTION FOR LEAVE TO FILE ATTACHED AMICUS BRIEF

Now comes the Southern States Police Benevolent Association (hereafter SSPBA) and respectfully moves this Court pursuant to Rule 37 for leave to file the attached amicus curiae brief in support of Petitioner Harris' Petition for a Writ of Certiorari.

SSPBA sought consent of the parties to file a brief in support of Petitioner's petition for a writ of certiorari. Petitioner consented, however, Respondent City of Virginia Beach refused consent therefore necessitating this motion.

SSPBA seeks to present the attached short amicus curiae brief because the Fourth Circuit decision below and the issues involved are vitally important to SSPBA's members and law enforcement officers throughout the country.

INTEREST OF SSPBA AS AMICUS CURIAE

SSPBA is a non-profit association comprised of over twenty thousand law enforcement officers and related public employees in ten southern states including Virginia. SSPBA and their members are vitally interested in the grave constitutional issues before this Court because traditional First Amendment protection is critically necessary in order to safeguard the interests of officers from retaliatory job termination. Law enforcement officers like petitioner Harris frequently suffer reprisal from whistleblowing about corruption within police agencies as in the case *sub judice*. SSPBA and its members and millions of public employees would be severely jeopardized and their speech dangerously chilled if the judgment and opinion below were to stand.

The tremendous volume of often conflicting reported cases addressing free speech issues in public sector work-

places demonstrate the magnitude of retaliation from unpopular speech and the divergent approaches of various circuit courts in public employee free speech jurisprudence. This case presents the Court with an opportunity to clarify the law in this confusing area and provide guidance for the lower courts in: 1) how to analyze the context of speech including the speaker's motivation, 2) how to balance content of speech of high public concern, and 3) how to factor in disruption as a component of the constitutional balancing test.

SSPBA vehemently submits that the continued right to free speech by law enforcement officers, as historically recognized by this Court, is perhaps the most important component of maintaining integrity in the law enforcement workplaces of America. SSPBA accordingly seeks to submit a short amicus curiae brief to assist this Court in its consideration of this important case.

In addition to the foregoing reasons, the accompanying SSPBA amicus brief offers additional grounds and additional cases supporting the acceptance of certiorari. The additional grounds offered are important for law enforcement officers everywhere.

SSPBA has previously appeared as amicus curiae before this Court and numerous other courts in law enforcement litigation.

WHEREFORE, SSPBA respectfully prays that this court grant leave to file the accompanying amicus curiae brief.

J. Michael McGuinness*
McGuinness & Parlagreco
236 North Poplar Street
P.O. Box 952
Elizabethtown, N.C. 28337
910-862-7087
*Counsel of Record

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BRENDHAN B. HARRIS,
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J. Michael McGuinness*
McGuinness & Parlagreco
236 North Poplar Street
P.O. Box 952
Elizabethtown, N.C. 28337
910-862-7087
*Counsel of Record

QUESTIONS PRESENTED

1. Whether a law enforcement officer's sworn testimony before a magistrate constitutes protected speech on a matter of public concern where the speech reported criminal offenses by a police lieutenant and the magistrate found probable cause that the police lieutenant had committed criminal offenses?

2. Whether and to what extent should the motivation of a whistleblowing employee be factored into the constitutional balancing test involving content, form and context in determining if speech by a public employee is of public concern and protected?

3. Whether whistleblowing speech exposing official public corruption and illegality is of such important public concern that such speech should be protected regardless of the motivation of the speaker?

4. Of the several conflicting circuit court approaches to constitutional interest balancing in public employee free speech cases, which approach best implements this Court's holding and rationale in *Rankin v. McPherson*, 483 U.S. 378 (1987) and affords appropriate protection for speech?

5. Whether the Fourth Circuit opinion below improperly affords undue weight to a speaking employee's motivation and potential disruption therefore suppressing speech which reported corruption by a senior police official?

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No. 95-1380

In The Supreme Court of the United States

October Term 1995

BRENDHAN B. HARRIS,
Petitioner

v.

THE CITY OF VIRGINIA BEACH, et. al.,
Respondents

On Petition For Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

AMICUS CURIAE BRIEF OF SOUTHERN STATES POLICE BENEVOLENT ASSOCIATION IN SUPPORT OF THE PETITIONER'S PETITION FOR A WRIT OF CERTIORARI

INTEREST OF THE AMICUS CURIAE

Amicus Curiae SSPBA incorporates by reference the Interest of the Amicus Curiae from the foregoing motion.

STATEMENT OF THE CASE

SSPBA adopts the Statement of the Case and Facts as presented by Petitioner.

SUMMARY OF ARGUMENT

The speech and expressive conduct of Petitioner Brendhan Harris must be protected by the First Amendment because his speech touched upon a matter of critical public concern: whether a police lieutenant committed criminal offenses and/or engaged in corruption.

In his authoritative treatise, Senator Sam J. Ervin, Jr. explained how "First Amendment freedoms are often grossly abused." Ervin, Preserving The Constitution (1984). Senator Ervin observed that "free speech is in mortal danger in America." *Id.* at x. Petitioner's firing for merely testifying as law enforcement officers are required demonstrates the wisdom in Senator Ervin's analysis.

The position adopted by the Fourth Circuit below herein would have dedicated law enforcement officers turn a deaf ear to criminal conduct and/or corruption within their agencies. Turning a deaf ear on criminal conduct of a police lieutenant could lead to evisceration of the rule of law, a prospect that this Court should not risk. Remaining silent in this context would offend ethical and professional obligations of police officers. Most profesional law enforcement agencies require officers to immediately report criminal conduct of fellow officers. Consequently, the First Amendment not only protected Petitioner's right to communicate, but sound public policy also encouraged his communication and testimony.

Since this Court's last treatment of the free speech rights of law enforcement officers in *Rankin v. McPherson*, 483 U.S. 378 (1987), circuit courts have taken very divergent approaches in implementing the constitutional interest balancing test enunciated by *Rankin* and its antecedents. This Court should grant the petition to resolve the circuit court conflict.

REASONS FOR GRANTING THE WRIT

For generations, this Court has vigilantly protected the free speech and associational rights of public employees like Harris. E.g., *Rankin v. McPherson*, 483 U.S. 378 (1987)(affording free speech protection to employee in law enforcement agency who remarked about an assassination attempt on President Reagan; Court found speech was of public concern and therefore protected); *Pickering v. Board of Education*, 391 U.S. 563 (1968) and their many antecedents.

Speech relating to public concern has been defined by this Court as any speech that can "be fairly considered as relating to any matter of political, social, or other concern to the community." *Connick v. Myers*, 461 U.S. 138, 146 (1983). The Fourth Circuit's holding and rationale in this case eviscerates these principles.

THE FOURTH CIRCUIT'S APPROACH BELOW IS INCONSISTENT WITH THE MAJORITY CASES THAT ELEVATE CONTENT OVER CONTEXT IN CONSTITUTIONAL INTEREST BALANCING IN PUBLIC EMPLOYEE FREE SPEECH CASES.

The dissent by Senior Judge Heaney well outlines the reasons why this Court should grant the writ. See slip op. at 16 - 22. The circuit court conflict in the balancing test is well identified therein.

SSPBA has encountered countless cases where trial courts have taken divergent approaches in applying this Court's balancing tests from *Rankin* and *Pickering*. This is especially troubling because the difference in the approaches appears outcome-determinative.

The Fourth Circuit's approach erroneously elevates **context** over the **content** of the speech in the constitutional calculus. The Fourth Circuit's approach in this case was erroneous because the court's analysis required that in order for pub-

lic employee speech to be protected, the employee must be "acting as a public citizen concerned with police corruption, as opposed to acting as a police officer embroiled in a personnel dispute." Slip. op. at 10.

Under the Fourth Circuit's approach, two polar extremes are presented: either one is speaking as a citizen or an employee. That approach is untenable for several reasons. First, it eliminates the most common scenarios that necessitate First Amendment protection: an employee who has learned of some wrongdoing that must be reported so that the rule of law can be preserved. It makes no constitutional or common sense for an employee to go home and change his hat, return to the workplace purportedly as "a citizen" and then articulate speech which would be protected. The Fourth Circuit's approach places un undue and unworkable emphasis upon attempting to glean the employee's motivation, a problematic task in any event. Observations of corruption often makes good cops motivated to speak out against the corruption.

The most important point in free speech analysis is whether the speech involves matters of public concern. Public spirited speech can just as easily arise from an employee as from a citizen. In fact, public employees are in the best position to know when public officials are committing fraud and malfeasance as in this case. Public employees, especially law enforcement officers, are taught to report misconduct. It seems un-American to condone retaliation with such severe injuries as job termination where public employees act in accordance with their training to report wrongdoing.

The Fourth Circuit's approach is untenable because it essentially predetermines the outcome of the controversy based upon a fictional decision of "which hat is worn" when the employee speaks. The Fourth Circuit's approach is also untenable because it ignores the fact that there are often "mixed motives" underlying the speech and conduct of police officers and others. Even if an officer is personally motivated, he may still be professionally motivated

A topic otherwise of public concern does not lose its importance merely because it arises in an employee dispute. *Hall v. Ford*, 856 F.2d 255, 260 (D.C. Cir. 1988); see cases cited in Petition. Under the Fourth Circuit's approach, if a police officer has an ongoing personnel dispute, police management is virtually immunized from suit for retaliation. Even if there is an ongoing personal or personnel dispute, ethical law enforcement officers must not turn a deaf ear on corruption.

The Fourth Circuit, after reviewing a cold record, has reversed the trial court who heard the evidence, observed the witnesses and was in the best position to ascertain motivation and credibility. Under the Fourth Circuit's approach, an appellate court is free to usurp the trial court's role in assessing the motivation of the speaking employee. These motivational determinations are best left to the trial court.

The Content of Petitioner's Speech Compels Protection

Of the three factors to analyze (content, form and context of speech), the Circuit courts have held that the "content, subject matter, of the speech in issue is always the central aspect" in making the public concern determination. *Arvinger v. Mayor and City Council of Baltimore*, 862 F.2d 75 (4th Cir. 1988). A plethora of courts have held that speech relating to the conduct and performance of public agencies, especially law enforcement agencies, is of utmost public concern and is among the most protected forms of any kind of speech.[1]

---

[1] E.g., *Biggs v. Village of Dupo*, 892 F.2d 1298, 1301-02 (7th Cir. 1990)(employee's interview with press discussing lack of agency funding protected); *Manhatten Beach Police Ass'n v. City of Manhatten Beach*, 881 F.2d 816 (9th Cir. 1989)(police officer's letter critical of manpower shortage held protected); *Rode v. Dellarciprete*, 845 F.2d 1195 (3rd Cir. 1988)(public employee's interview with reporter alleging racial harassment of her held protected); *Matulin v. Village of Lodi*, 862 F.2d 609 (6th Cir. 1988)(public employee's statements to press regarding employment discrimination held protected); *O'Donnell v. Yanchulis*, 875 F.2d 1059 (3rd Cir. 1989)

As demonstrated in *Bryson v. Waycross*, 888 F.2d 1562, 1566 (11th Cir. 1989), "a core concern of the first amendment is the protection of the 'whistleblower' attempting to expose government corruption". A police officer's perception of potential graft and corruption is deserving of vigilant protection by the First Amendment.

Numerous cases make clear that speech by a law enforcement officer reporting malfeasance, corruption or inefficiency are of paramount public concern and are protected. E.g., *Walter v. Morton*, 33 F.3d 1240, 1242-43 (10th Cir. 1994)(statements of perceived illegal activities of chief of police are matter of public concern for community); *Brawner v. City of Richardson*, 855 F.2d 187 (5th Cir. 1988)(letter alleging police departmental improprieties held protected); *Murphy v. City of Flushing*, 802 F.2d 191, 196 (6th Cir. 1986)(public obviously concerned with how a police department is operated); *Bricknell v. Norton*, 732 F.2d 664 (8th Cir. 1984)(public has a "vital interest" in police department); *Soleman v. Royal Oak Township*, 842 F.2d 862 (6th Cir. 1988)(police officer's statements alleging departmental improprieties held of public concern and protected); *O'Brien v. Town of Caldonia*, 748 F.2d 403, 407 (7th Cir. 1984)(police officer's communications alleging departmental problems "is deserving of vigilant protection by the First Amendment.")

The most recent cases underscore the settled rules from the foregoing law enforcement free speech cases. E.g., *Orange v. District of Columbia*, 59 F.3d 1267, 1272-73 (D.C. Cir. 1995)(examining potential fraud at a public university involves matters of interest to the community, seeking to "bring to light actual or potential wrongdoing or breach of public trust."); *Patrick v. Miller*, 953 F.2d 1240, 1247 (10th Cir. 1992)(perceived illegalities in City's budgeting activities constituted topic of "inherent" public concern). In *Watters v. City*, 55 F.3d 886, 891 (3rd Cir. 1995), the Third Circuit reversed summary judgment for an em-

ployer in a free speech case where the police department employee, the director of the employee assistance program, made comments about how the "lack of official policies caused problems..." Even far less serious communications about problems in police departments merit protection. See *Wilson v. UT Health Center*, 973 F.2d 1263, 1269 (5th Cir. 1992)(complaints about sex harassment within police agency are of public concern). "[P]ublic awareness and criticism have even greater importance where, as here, they concern allegations of police corruption." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1035 (1991).

As the court in the seminal case of *Brukiewa v. Police Comm.*, 263 A.2d 210 (Md. 1970) explained: " There can be no doubt that a policeman has full First Amendment rights," 263 A.2d at 218, citing *Garrity v. N.J.*, 385 U.S. 493, 500 (1967)("Policemen, like teachers and lawyers, are not relegated to some watered down version of constitutional rights.") Accord *Wood v. Georgia*, 370 U.S. 375 (1962)(statement by Sheriff raising issues of racial agitation by judge held protected speech).

As the dissent amply demonstrates, this Court's analysis in *Connick v. Myers* demonstrates that there is a sliding scale of protection dependent in part upon the degree of public concern of the speech. The dissent also spells out the fact that numerous circuit courts afford protection for employee speech about corruption and illegality, regardless of motivation. See dissent, slip op. at 20.

Connick is Distinguishable On Several Grounds

Connick involved an assistant district attorney, Shelia Myers, who engaged in insubordinate behavior causing actual disruption within the District Attorney's office. In *Connick*, Myers was confronted with a job transfer and this action was personal and unique to her, as contrasted with broader personnel issues that may have affected the entire

agency. After Myers was informed of the transfer, which she strongly opposed, she responded by preparing an employee survey which was distributed while on the job. Myers' survey also contained statements questioning the integrity of her own superiors. Distribution of this survey while on the job caused a "mini-insurrection" within the office. *Id.* at 141.

Connick emphasized that "a stronger showing [of disruption] may be necessary if the employee's speech more substantially involved public concern. " 461 U.S. at 152. This "stronger showing" of disruption is applicable here because Petitioner's conduct involved the type of substantial public concern that *Connick* envisioned. This in fact is born out in circuit cases construing *Connick* as substantial actual disruption is required in cases where the public concern is particularly strong.

"The nature of the government's burden to show disruption, moreover, varies with the content of the speech." *Hyland v. Wonder*, 972 F.2d 1129, 1139 (9th Cir. 1992)(employee's memo criticizing her own employing agency's director and problems within the agency held to constitute a matter of public concern and protected). "The more tightly the First Amendment embraces the speech the more vigorous a showing of disruption must be made." *Id.* The disruption to be proven by the employer must be "actual, material and substantial ..." *Id* at 1140, citing numerous cases. Disruption must be "real [and] not imagined." *But cf. Tyler v. City of Mountain Home*, 72 F.3d 568 (8th Cir. 1995)(demonstrating how circuit courts analyze disruption with different standards). The circuit courts are equally split on disruption standards and how to factor disruption into the balancing test. *Cf. Hyland, supra., Tyler, supra., O'Donnell, supra.*

CONCLUSION

WHEREFORE, Amicus Curiae Southern States Police Benevolent Association respectfully urges this Court to grant the Petition, and reverse the decision of the Fourth Circuit.

J. Michael McGuinness*
McGuinness & Parlagreco
236 North Poplar Street
P.O. Box 952
Elizabethtown, N.C. 28337
910-862-7087
* Counsel of Record

CERTIFICATE OF SERVICE

I hereby certify that I have had the foregoing motion and brief served upon counsel of record for Petitioner and Respondent, through their counsel, A.W. Vandermeer, Jr., Clark & Stant, P.C., One Columbus Center, Virginia Beach, VA 23462 and L. Steven Emmert, City Attorney's Office for the City of Virginia Beach, City Hall, Virginia Beach, VA 23456.

J. Michael McGuinness
Member, Supreme Court Bar

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In The Supreme Court Of The United States

OCTOBER TERM, 1995

BRENDHAN B. HARRIS,

Petitioner,

v.

THE CITY OF VIRGINIA BEACH, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Charles B. Miller*
L. Steven Emmert
Richard J. Beaver
Assistant City Attorneys
OFFICE OF THE CITY ATTORNEY
Municipal Center
Virginia Beach, VA 23456
(804) 427-4531

*** *Counsel of Record***

LAWYERS PRINTING COMPANY 7th & Franklin Bldg. Richmond, Virginia 23219 (804) 648-3664

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QUESTIONS PRESENTED

I. Is a police officer's speech concerning the supervisory actions of his supervisor toward him, and affecting no other persons, a "matter of public concern?"

II. Does a police officer's speech concerning the supervisory actions of his supervisor toward him and affecting no other persons become a "matter of public concern" when the speech is made to a magistrate with the obvious goal of punishment of the supervisor for the supervisory actions with which the officer disagrees?

III. Where a police department has officially investigated a police officer's allegations of wrongdoing by his supervisor and determined not to take any action, does the First Amendment allow that officer in his official capacity to then criminally prosecute the supervisor without being subject to disciplinary action?

IV. Does the record support the conclusion of the court of appeals that Harris had not engaged in "speech" protected by the First Amendment?

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STATEMENT OF THE CASE

I. Introduction

On August 28, 1992, Virginia Beach police officer Brendhan Harris answered a call in which a fight ensued between Harris and two women (Diedre Gamble and Terry Grey). Harris felt that charges should be brought against the women and took Gamble into custody after subduing her with pepper gas. Master Police Officer A. N. Ortiz, on scene to back-up Harris, reported to Lieutenant G. M. Van Auken, the shift supervisor, his concern that Harris mis-handled the incident and precipitated the altercation. Van Auken consequently advised Harris to take no further action until the matter could be investigated. Disregarding Van Auken's instruction, Harris that same day obtained warrants against Gamble and Grey. Harris had Gamble served; Van Auken a couple of days later took possession of the unserved warrants against Grey. The charges against Gamble were nol-prossed on the day of trial, September 30, at the request of Van Auken. At all times Van Auken acted with the knowledge and concurrence of his superiors.

Harris made an official complaint against his precinct commander Captain E. E. Rorrer, and Van Auken, specifically challenging the actions taken and orders given by Van Auken relating to the August 28 incident. This complaint was formally investigated and the actions of Rorrer and Van Auken determined to be appropriate.

The investigation into Harris's on-scene handling of the August 28 incident, and Harris's subsequent actions contrary to the instructions of Van Auken, resulted in Harris receiving an eight hour suspension from duty and a written reprimand. Personnel review board action on Harris's appeal of this disciplinary action was pending on July 30, 1993.

Harris took matters into his own hands again on July 30, 1993, when, on duty and in uniform, he obtained criminal summonses against Van Auken for obstruction of an officer in the performance of his duties and failure to serve warrants.

This insubordinant act resulted in disciplinary action which led to Harris's dismissal from the police department.

II. Salient Facts

A. Harris observed neither "criminal activity" nor "corruption."

The following is the conduct which Harris observed after the altercation between Harris and the two women and the report by officer Ortiz that Harris may have acted inappropriately. In each instance, Van Auken acted in consultation with his superiors.

(1) In telephone conversations with Harris after Harris had arrested Gamble and taken her to the hospital for treatment of the pepper gas he had used to subdue her, Van Auken directed Harris to release Gamble and allow her to be interviewed by Internal Affairs. (Tr. 65, 266-271, 615-619.)

(2) Van Auken, at the direction of Captain Rorrer, accepted from Harris the unserved warrants against Grey which Harris had obtained, contrary to orders from Van Auken, and placed them either on his desk or in his desk drawer. (Tr. 71-72, 275-278.)

(3) Van Auken appeared in court on September 30, 1992, the day the charges against Gamble were set for trial, and, in the absence of the assistant City Attorney assigned to the case (who was temporarily in another courtroom when the case was called), advised the court that the City desired to nolle prosequi the charges. Van Auken also presented to the court a letter to the City Attorney requesting the charges be nol prossed. Van Auken had drafted and prepared the letter on behalf of Deputy Uniform Division Commander Captain M. E. Beane. (Tr. 74, 280, 286-287.)

B. Harris's "speech" to the magistrate is his version of these actions by Van Auken:

> To the best of my recollection, I advised the magistrate of the facts surrounding Lt. G.

M. Van Auken's retrieval from me and refusal to have served certain warrants issued for the arrest of Terry Gray (sic) and his providing false information to the Court in a letter dated September 29, 1992 addressed to William Bynam (sic), which he had initialed with the initials of Captain M. E. Beane, and submitted in Court in support of a motion to "nol pros" a proceeding against Diedre Gamble. Specifically, I informed the magistrate that I was instructed to give to Lt. Van Auken the warrants against Ms. Gray (sic). I personally handed the warrants to Lt. Van Auken and he placed the warrants in his desk, in my presence and that, to my knowledge at the time, the warrants were still in Lt. Van Auken's possession. I also informed the magistrate that at least three of the representations set forth in the September letter to Mr. Bynum (sic) were, to my knowledge, completely false, and that I understood and believed that the Judge of the General District Court relied on these misrepresentations authored and initialed by Lt. Van Auken in deciding to nol pros the case against Ms. Gamble.

(Harris, in his sworn answer to Interrogatory 2, Def. Summary Judgment App., 298-299.)

C. At Harris's request, the magistrate translated these supervisory actions into charges of criminal conduct.

Based upon the "sworn statement of: Off. B.B. Harris, 2nd Prct/VBPD, VBeach, VA." given just after midnight on the morning of July 30, 1993, three summonses were issued by the magistrate charging that Van Auken did:

> (1) [O]n or about August 28, 1992 . . . unlawfully Without just cause, knowingly obstruct a law-enforcement officer in the performance of his duties as such in violation of Section 18.2-460, Code of Virginia.
>
> (2) Diverse Days August 31-September 30, 1992 . . . Willfully and corruptly omit or delay to execute such process, whereby such person shall escape or go at large in violation of Section 18.2-469, Code of Virginia.
>
> (3) [O]n or about September 30, 1992 . . . unlawfully Without just cause, knowingly obstruct a law-enforcement officer in the performance of his duties, as such in violation of Section 18.2-460, Code of Virginia.

(Ex. A-9, JA 326-331; Tr. 98.)

THE PETITION SHOULD BE DENIED

I. This case (and record) is not an appropriate choice for review.

Although this case arises from a complex factual setting which includes a police response to a burglary, an altercation and arrest, the police department's management of that response, citizen complaints, personnel grievances, at least three separate Internal Affairs investigations, a lengthy personnel review board hearing, and various administrative actions by police department officials[1], the truly relevant facts are simple. And the legal conclusion is straightforward. It is hardly a case for review by this Court. *Cf.*, *Rankin v. McPherson*, concurring opinion by Justice Powell, 483 U.S. 378, 392-394, 107 S.Ct. 2891, 2901-2902, reh'g denied, 483 U.S. 1056, 108 S.Ct. 31 (1987).

II. The court of appeals aptly applied *Connick*.

Connick v. Myers, 461 U.S. 146, 103 S.Ct. 1684 (1983) provides the guidance for determining whether or not Harris's claimed protected speech is, as a matter of

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[1] All of which is reflected in a commensurately complex record (Defendant's Summary Judgment Appendix, alone, is 820 pages; the trial transcript 846 pages).

law, indeed protected by the First Amendment. The language of *Connick* is straightforward:

> When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment. Perhaps the government employer's dismissal of the worker may not be fair, but ordinary dismissals from government service which violate no fixed tenure or applicable statute or regulation are not subject to judicial review even if the reasons for the dismissal are alleged to be mistaken or unreasonable. (Citations omitted.)
>
> * * *
>
> Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record.

461 U.S., at 146-148, 103 S.Ct., at 1690. Furthermore,

> **[t]o presume that all matters which transpire within a government office are of public concern would mean that virtually every remark--and certainly every criticism directed at a public official--would plant the seed of a constitutional case. While as a matter of good judgment, public officials should be receptive to constructive criticism offered by their employees, the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs.**

***Id.*, 461 U.S., at 149, 103 S.Ct., at 1691.**

The content of what Harris told the magistrate was that Van Auken did three things as a police lieutenant supervisor in the performance of his supervisory responsibilities with which Harris disagreed. The form in which Harris spoke these words was to the magistrate seeking to subject his supervisor to misdemeanor criminal charges. The context in which this was spoken was as an on duty, in uniform, police officer seeking to unilaterally bring criminal charges against his supervisor for these actions in the larger, overall, context of his continued disagreement with the three supervisory actions taken by Van Auken. The content of these words *as translated by the magistrate* into misdemeanor criminal charges are the charges as written.

Thus, eleven months after the event, Harris again complains about and challenges the judgment and

authority of his immediate supervisor to act on behalf of the police department with respect to an altercation which occurred on Van Auken's watch and involved Harris: Harris still does not accept Van Auken's determination that because of the manner in which the August 28 incident evolved, no charges should be brought.

Measuring this claimed protected speech--the information given the magistrate which resulted in charges against Van Auken--against the *Connick* benchmarks of content, form, and context unequivocally confirms that this is not the voicing of any matter of legitimate public concern, but Harris's continuing pursuit of his personal grievance.

III. The record supports the court of appeals' conclusion that Harris's speech was not a matter of "public concern."

Although replete with references to "criminal activity" and "exposing police corruption," Harris's Petition--and the record--is simply devoid of any facts to substantiate these references.[2] It is clear that the "criminal misconduct by a police lieutenant" which Harris was ostensibly "exposing" (a) existed only in Harris's

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[2] Nor is this case about "corruption by public servants," "corruption within the ranks of law enforcement," "strong evidence implicating a government official," or "restoring integrity."

mind[3], (b) affected only Harris and his supervisor Van Auken, (c) became "criminal" only by the magistrate's leap of faith at the unilateral request of Harris, and, (d) other than the passing interest presumably shared in *anything* that happens in a municipal police department, neither interested nor affected the public.

Harris takes issue with the conclusion of Circuit Judges Luttig and Williams that there was "a virtual absence of evidence in the record indicating that Harris was 'exposing' any corruption whatsoever . . .." (Harris Petition at 14, n.12), but fails to identify any such evidence. And, indeed, he cannot.

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[3] **(1) Because he was aware of a standing general order that custody of a prisoner was the sole responsibility of the arresting officer, Harris *questioned the legality of Van Auken's directive* [that Gamble be released from custody]. (Harris Petition, at 4; emphasis added.)**

(2) Because he was aware of a Virginia statute that required that criminal warrants be served forthwith, Harris *questioned Van Auken's conduct* [in taking from Harris the Grey warrants which precinct commander Rorrer had directed Harris to give to Van Auken]. (Id., at 5; emphasis added.)

(3) Harris obtained a copy [of the letter given to the court by Van Auken in support of the City's motion to nol pros] and *concluded that it contained a number of false and/or misleading statements*. (Id; emphasis added.)

IV. The "split" among the Circuits is illusory.

The analysis of Harris's claimed protected speech under *Connick* inexorably leads to the same conclusion whether or not "content" or "context" is first considered. Harris's arguments that "motivation" was, is, should, or shouldn't be a part of the calculus ignore the reality of the situation, as reflected in the entire record.

V. The court of appeals' decision is a just resolution of this case.

The decision of the court of appeals preserves the authority and responsibility of a police department to supervise its police officers. To hold otherwise would be to sanction a police officer charging his or her supervisor with "obstruction of justice" every time that officer's view of "justice" is impinged upon by supervisor action, and would impair the department's ability to effectively exercise control over its police officers.

Harris knew what the department's position was with respect to the August 28 incident.[4] And, until he sought to punish Van Auken for his perceived transgressions by couching the supervisory actions he disliked in the form of criminal charges and seeking

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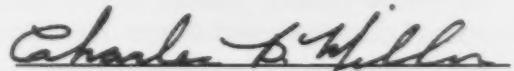
[4] See, for instance, the September 30 letter to Harris from Captain Rorrer (Ex. A3, JA 317-318; Tr. 81).

misdemeanor convictions and fines, he had formally complained to the uniform division commander, been reassigned to another precinct, and appealed the relatively minor disciplinary action[5] to the independent personnel review board *without* retribution or recrimination.

CONCLUSION

Connick provides the law governing the First Amendment protection afforded public employees. It is well-established precedent which provides clear guidance. The court of appeals has followed *Connick*, neither abridging, amending, nor expanding its application in the process.

The petition for certiorari should be denied.



Of Counsel

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[5] Two separate conduct reports against Harris resulted from the August 28 incident: One, charging excessive force and failure to assist citizen, was a consequence of Grey's citizen complaint, and resulted in a four hour suspension from duty and a written reprimand, which was reduced upon review and grievance appeal procedure to a four hour suspension. The second, for failure to follow Van Auken's orders regarding further action, charged disobedience of orders and insubordination, and initially resulted in a suspension of 24 hours, which was reduced upon review and grievance to four hours suspension and a written reprimand. (Gamble's complaint against Harris was dismissed as "unfounded".)

Charles B. Miller*
L. Steven Emmert
Richard J. Beaver
Assistant City Attorneys
Office of the City Attorney
Municipal Center
Virginia Beach, VA 23456
(804) 427-4531

***Counsel of Record**